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A FORGOTTEN PASSAGE FROM THE WRITINGS OF "JUNIUS"

Constitutional law may exist in the minds of men even if it is violated in practice. Professor McIlwain maintains that the Petition of Right was not revolutionary but an assertion of constitutional ideas, and that this was the view of John Adams is shown by his letters of 1765, written under the name of "Earl of Clarendon" and directed to "Pym." In one of these letters he impersonates Clarendon as saying, after about a century of reflection:

> "* * * since my departure from the earth I have revolved these things so often, and seen my errors so clearly, that were I to write a history of your opposition now, I should not entitle it a rebellion; nay, I should scarcely call the protectorate of Cromwell a usurpation."*

In all the discussions of the background of our American constitutional principles and the historical soundness of the references to Lord Coke's views as to the limitations of parliamentary power, etc., we do not remember having seen any reference to the following striking passage from the "Dedication to the English Nation," written by "Junius" in 1771 and prefixed to the first authorized edition of his "Letters" which appeared in 1772. This passage, appearing as it did early in the period during which the American constitutional principles of reasonable restraint of "arbitrary" power were gradually formulating themselves, is worthy of considerate attention.

EXTRACT FROM THE "DEDICATION TO THE ENGLISH NATION" OF THE "LETTERS OF JUNIUS"

"The power of King, Lords, and Commons, is not an arbitrary power. They are the trustees, not the owners, of the estate. The fee-simple is in US. They cannot alienate, they cannot waste. When we say that the legislature is supreme, we mean that it is the highest power known to the constitution:—that it is the highest in comparison with the other subordinate powers established by the laws. In this sense, the word supreme is relative, not absolute. The power of the legislature is limited, not only by the general rules of natural justice, and the welfare of the community, but by the forms and principles of our particular constitution. If this doctrine be not true, we must admit that King, Lords, and Commons, have no rule to direct their resolutions, but merely their own will and pleasure. They might unite the legislative and executive power in the same hands, and dissolve the constitution by an act of parliament. But I am persuaded you will not leave it to the choice of seven hundred persons notoriously corrupted by the crown, whether seven millions of their equals shall be freemen or slaves. The certainty of forfeiting their own rights, when they sacrifice those of the nation, is no check to a brutal, degenerate mind. Without insisting upon the extravagant concession made to Harry the Eighth, there are instances, in the history of other countries, of a formal deliberate surrender of the public liberty into the hands of the sovereign. If England does not share the same fate, it is because we have better resources than in the virtue of either house of parliament."

*See "John Winthrop and the Constitutional Thinking of John Adams." Proceedings Mass. Hist. Soc., vol. 63, Feb., 1930.

Whether "Junius" was Sir Philip Francis or someone else we do not know, as we understand that his identity is still disputed. His first letter was dated "21 January, 1769," and they continued at intervals until 1772. They inspired an American imitator in the person of Arthur Lee* of Virginia, who wrote under the name of "Junius Americanus" a series of letters beginning July 19, 1769, on the despotic treatment of the American Colonies. We have before us a copy of these letters entitled, "The Political Detection or the Treachery and Tyranny of Administration Both at Home and Abroad Displayed in a Series of Letters signed Junius Americanus," published in London and sold for one shilling by "J. and W. Oliver No. 12 in Bartholomew—Close, near West—Smithfield MDCCLXX." On the title page of this volume, in the possession of the Massachusetts Historical Society, are written these words, "J. Pickering —The Gift of Mr. Saml Adams."

Both the letters of "Junius" and those of "Junius Americanus" reek with condemnation of "arbitrary" methods of government and add force to the significant words of Sam Adams in the Massachusetts Convention of 1788 when, on February first, he gave his essential support to the proposals of Hancock, which resulted in the ratification of the Constitution of the United States, as follows:

> "Your Excellency's first proposition is, 'that it be explicitly declared, that all powers not expressly delegated to Congress, are reserved to the several States, to be by them exercised.' This appears to my mind to be a summary of a bill of rights, which gentlemen are anxious to obtain; it removes a doubt which many have entertained respecting this matter, and gives assurance **that if any law made by the Federal government shall be extended beyond the power granted by the proposed Constitution,** and inconsistent with the Constitution of this State, **it will be an error, and adjudged by the courts of law to be void."** (See Debates of Convention of 1788, p. 233.) F. W. G.

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*In his diary under date of April 21, 1778 (written in France), John Adams said of Arthur Lee (the youngest of the five Lee brothers):

> "Arthur had studied and practiced physic, but not finding it agreeable to his genius, he took chambers in the temple in England, and was there admitted to practise as a barrister, and being protected by several gentlemen of rank among the opposition, was coming fast into importance. Animated with great zeal in the cause of his native country, he took a decided part in her favor, and became a writer of some celebrity by his Junius Americanus and other publications. Becoming known in America as a zealous advocate of our cause, the two Houses of the Legislature of Massachusetts Bay appointed him provisionally their agent to the court of Great Britain, in case of the death, absence, or disability of Dr. Franklin, in which capacity he corresponded with some of the members of that assembly, particularly with Mr. Samuel Adams, and with the assembly itself, transmitting from time to time information of utility and importance. After a Congress was called in 1774-5 and 6, he continued to transmit to us some of the best and most authentic intelligence which we received from England."—Works of John Adams, vol. III, 139-140.

RECENT CONSTITUTIONAL LAW IN THE SUPREME COURT

By G. A. H. FRASER, *of the Denver Bar*

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THE word "recent" in the title is intended to carry back to January, 1934, the date of the Minnesota Mortgage Moratorium case, the first of several decisions of the Supreme Court of the United States which made conservatives stare and gasp. From that time to March, 1936, 67 statutes, state and federal, have been tested, in whole or in part, by that court, of which 26 were held unconstitutional and 41 constitutional. Forty-six of the 67 were state statutes, and of these 16 were held unconstitutional and 30 constitutional. Twenty-one of the 67 were federal statutes, and of these 10 were held unconstitutional and 11 constitutional.

Charles Warren, in the last edition of his book, "Congress, the Constitution and the Supreme Court," states that up to June, 1935, the court had held only 73 federal statutes unconstitutional in about 146 years of its existence, an average of one every two years. Obviously the proportion of rejections has vastly increased of late, and the overthrow of state statutes is also extensive. When one scans the last seven volumes of Supreme Court reports, two reasons for this leap to the eye. One is the multiplication of ill-devised tax laws, whereby honestly puzzled or thievishly spendthrift legislatures have cast about for untapped sources of revenue, but more important is the mass of novel and experimental enactments, state and federal, designed for the relief of debtors, the regulation of business in matters heretofore left to individual initiative, the equalizing of wealth, or the creation of prosperity by statute. These well-meant measures have often been framed without regard to the basic liberties of the citizen under the constitution, or the equally basic duality of our system with specifically limited powers in the federal government and all the residue in the states. Such legislative encroachments were foreseen by Thomas Jefferson when he wrote:

"The executive, in our government, is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is

the most formidable dread at present, and will be for many years. That of the executive will come in its turn, but it will be at a remote period."

Through this welter the court has moved with its usual impartiality, but with less than its usual accord. During the last two years it has been unanimous in the great majority of cases involving general law, but not in the tax cases or the constitutional cases, and this is due both to the close and difficult questions presented and to the inborn qualities of the judges themselves. In Gilbert and Sullivan's "Iolanthe," the sentry, as he stalks up and down before the palace, sings:

> "How every little boy or gal
> That's ever born into the world alive
> Is either a little liberal
> Or else a little conservative."

This is a universal cleavage of human kind, often widened by heredity, environment, education and experience of life. Hence it is natural to find the present Supreme bench composed of four reliable conservatives, three equally dependable liberals (both terms only loosely descriptive), and two unpredictables, the Chief Justice and Mr. Justice Roberts, who are found as often in one camp as in the other. There has seldom been a better balanced court. In the great cases of the recent past the liberals tend to favor social measures against the assertion of individual rights. Also, to them the voice of the legislature is the voice of the people, and therefore the voice of God. They recognize, of course, the dominance of constitutional restrictions, but would rather loosen than contract them, and especially in considering state statutes they tend to give such wide and prevailing effect to the state police power that anyone who attacks a statute under the "due process of law" or "equal protection of the laws" clause of the 14th Amendment is likely to have a bout of bad luck. In all this they are frequently supported by the two free-lances. The conservatives tend toward a more literal construction and stricter application of the constitution. It is there that they hear the voice of the people, authoritative through generations of experience. They constantly invoke it to defend individual liberty against the exactions and restrictions of the legislature and this is very noticeable in tax cases, where their regular tendency is to protect the taxpayer wherever possible. It

thus appears that both lines of constitutional interpretation are ably represented: now one, now the other prevails according to the merits of the case, and justice is attained as substantially and as uniformly as can ever be hoped for in a fallible world.

The *Literary Digest* reports that Judge Manton of the 2nd C. C. A. recently attacked the conservative wing of the court for, as he said, thrusting its "pet economic or social theory" into the constitution. If this criticism is correct, which I do not believe, exactly the same is true of the liberals, and of late there have been many critics of both wings of the court, such as the man, Raymond Clapper, who daily strews our breakfast tables with the sweepings of the Washington pressrooms.

None of us likes to have his preferences thwarted, and probably each of us, from the radical to the reactionary, would have preferred some of the late decisions to have gone the other way; but when you read, not merely one or two, but the entire recent series of great constitutional opinions, including the dissents, where there were dissents, you cannot fail to be impressed by the straight course the court has steered through troubled waters, and by the honesty and earnestness with which all the judges without exception have applied their very high abilities to doing absolute right as they severally saw it.

Representative Zioncheck recently said in Congress: "I do not believe that the judges of the Supreme Court are gods; in my opinion only three of them are gods," and yet these three, with their well-known liberal views, joined in rejecting the Frazier-Lemke Mortgage Act, the NRA itself, and a number of minor enactments, and two of them joined in the rejection of the so-called "hot oil" Act. The man who says, as many are saying, that the Supreme Court is in politics, or that it has decided cases to suit the social or economic prejudices of its members, is either an ignoramus or a blinded partisan or a hired propagandist and I believe that every honest lawyer, from the conservative to the communist, should repel such slanders whenever heard. The essential nature of the men leads one set to feel that a strict constitutional construction is right and the other set a free construction, but you have

only to read their opinions to see that beyond this inherent quality their minds are bent solely on the legal qualities of the statute before them, as tested by the constitution.

What, then, has the court actually decided in the last two years?

With 67 cases before us we can choose very few and touch those very lightly. Decisions on state statutes are quite as instructive as those on federal statutes, although less sensational, and there is one group which I am impelled to mention. As you all know, there is no constitutional ground on which state statutes are more frequently attacked than the 14th Amendment, forbidding the state to deny due process of law or the equal protection of the laws, expressions which are very wide and indefinite and leave much room for diversity of opinion among judges. It is worth while to notice the Supreme Court test as illustrated by the New York milk cases, which are as interesting economically as legally. They show what happens when a state attempts to fit ordinary business to a legislative bed of Procrustes. There are seven or eight of these milk cases, so that my attempt will be merely to do a little skimming.

New York state suffered from an overproduction of milk. Farmers complained that they did not make expenses. Dealers complained that there was price-cutting and competition destructive of their profits. Consumers were not complaining, but who pays any attention to consumers? The legislature undertook to remedy the situation by fixing a minimum price of 5 cents a quart to be paid by dealers to farmers and a minimum of 10 cents a quart to be charged to consumers by dealers who made delivery, or 9 cents a quart by dealers selling over the counter. A small Italian grocer sold two quarts for 18 cents and gave a 5-cent loaf of bread as a bonus (suggesting, incidentally, the size of the profit which dealers were making under the artificial price). He had to go to jail for that, and in *Nebbia vs. New York*, 291 U. S. 502, the Supreme Court by a 5-4 decision left him there. The question was whether the state had the right to fix prices of an ordinary commodity, or whether its price-fixing power was limited to public utilities or to a business directly affected with a public interest. Mr. Justice Roberts says for the ma-

jority that, as the state may protect free competition and prohibit monopolies, so equally it may restrict competition if it thinks it wise; that it is for the legislature to decide what trade or business needs control for the public good, and that when it controls it, by price-fixing or otherwise, the law "is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarrantable interference with public liberty." The four conservatives observed that the decision went beyond anything previously held by the court and paved the way for legislative despotism.

The next step was taken by consumers. Deprived by law of cheap milk, they naturally tried to get the best milk for their money, and turned to Borden's and similar reliable and well-known brands. Thereupon, the wise milk board, deeming that Borden et al. were getting too much business, to the detriment of less-known dealers, passed another regulation providing that dealers "having a well-advertised trade name" must charge 1 cent more per quart to consumers than more obscure vendors. This also was upheld by a 5-4 decision (*Borden's Farm vs. Ten Eyck*, 56 Sup. Ct. Rep. 453), on the ground that the state power to regulate business includes the power to equalize it. The four conservatives, or, to my thinking, liberal dissenters, considered the law grossly arbitrary and oppressive, as penalizing the man who becomes well-known and successful through wide and honest dealing and depriving him of the equal protection of the laws.

The next point in this object lesson in the economics of artificial high prices was raised by a new set of dealers—I do not say a set of New Dealers. Observing the opportunity of profit in the 100 per cent spread between the price at which dealers must buy and must sell, they rushed into the New York market, to the disturbance of the unstable equilibrium artificially created. Thereupon the milk board, in a desperate attempt to maintain its theory of equalized trade, issued a new ukase to the effect that any dealer entering the business after a certain date must sell for not less than Mr. Borden and others with famous trade names; i.e., must sell at a higher price than the ordinary dealers already in business. This was carried up on the same clauses of the 14th Amendment, and at last

the worm turned. The badgered court, in *Mayflower Farms vs. Ten Eyck*, 56 Sup. Ct. Rep. 457 (Feb. 10, 1936), held that this in effect prohibited any new dealer from entering the business and considered the classification to be arbitrary, oppressive and a denial of the equal protection of the laws. The three so-called liberal judges dissented.

Earlier in time, but the final stroke in the economic picture, came *Baldwin vs. Seelig*, 294 U. S. 511, a good illustration of the lengths to which a legislature may be driven in bolstering up an attempt to make economic adjustments by fixing prices. A dealer, not satisfied with the law-made 100 per cent spread between his buying price and selling price, began importing milk from Vermont where there was no price control and where farmers would sell for less than 5 cents per quart. The milk board countered by totally prohibiting the sale in New York of milk imported from other states if it had been bought there for less than the New York price to farmers. The Supreme Court, however, unanimously enjoined this as a restriction of commerce between the states and as an attempt to neutralize price advantages prevailing in the state of origin by what amounted to a customs barrier erected by one state against another. Thus we see New York, starting with more milk than it knew what to do with, and ending by bringing in an additional flood of milk from other states, all by its own regimentation. *Sic semper tyrannis!* The court, of course, sedulously avoids any opinion as to the wisdom or policy of any of the measures before it, but even the court, while sustaining one of these milk laws, could not refrain from saying:

> "The present case affords an excellent example of the difficulties and complexities which confront the legislator who essays to interfere in sweeping terms with the natural laws of trade or industry."

The upshot of these cases is that a state statute will be upheld against the 14th Amendment if it relates to any matter of public welfare and is not glaringly arbitrary. To be set aside, it must either have a private rather than a public bearing or it must involve such gross inequality or do such unnecessary damage to individuals as to shock the conscience. Here the difference between the two lines of thought in the court is very clear. The conservatives try to preserve individual

rights against undue statutory interference; the liberals treat the legislative power as almost unlimited in any possible field of public interest, and decline to apply the constitutional restrictions unless the lawmakers have acted as "arbitrary despots" (Cardozo, J.). The old wing emphasizes individualism, the other collectivism. There is logic on both sides and the majority may be moving with the times, but it seems to me that the constitution concerns itself very specially with individual liberty, and that the alternative to individual liberty is collective tyranny. Here again Mr. Jefferson says:

> "It would be a dangerous delusion if our confidence in the men of our choice (i. e., the legislators) should silence our fears for the safety of our rights. * * * In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the constitution."

Following this great authority, I think that the courts are the last, and often the only defense of liberty, and that it is a pity when they stretch the constitution to uphold the passing crotchets of legislatures such as we all have known.

However, this is merely an idle reflection, since the Supreme Court thinks otherwise. In the days of that outstanding and dominant personality, Grover Cleveland, there was a popular song about him, the refrain of which ran:

> "And when the old man says a thing,
> Why, that's the thing that goes;
> For the old man says so,
> And the old man knows."

So of the Supreme Court.

The famous cases of the recent past, sustaining or overthrowing acts of Congress, are fresh in your memory, and are far too massive for summary treatment. Only the gold cases and the Triple A case seem to me to present any legal novelty. With the others the novelty is not in the constitutional law announced by the court, but in the measures to which that law was applied. This struck the court itself, since the majority opinion in the Triple A case, after instancing many fantastic laws which might follow if the Triple A were upheld, adds:

> "It cannot be said that they envisage improbable legislation. The supposed cases are no more improbable than would the present act have been deemed a few years ago."

These recent cases cannot well be classified, for Congress is now seen casually handing over its law-making power to Tom, Dick, Harry or Franklin, and now arrogating that power over fields belonging to the states, or to individuals. The only qualities common to most of the questioned acts are a purpose to help the less fortunate by reforming national economy, and the assumption of unlimited power to do so, including the power to transfer power. Several of these acts rather candidly embody the idea of taking one man's property and giving it to another, which still remains a legislative solecism. The existence of a supreme law, restraining Congress, as well as the rest of us, is ignored, and the fact that some of these measures do fall within the constitution seems almost accidental. Assuming a constitution, the court's rejection of the others was inevitable. Time allows a mere mention of some of the more spectacular cases. In *Panama Refining Co. vs. Ryan,* 293 U. S. 388, the court, standing 8-1, rejected the clause of the NIRA authorizing the president to prohibit or not, as he pleased, the movement in interstate commerce of oil produced or taken from storage in excess of the amount allowed by the state of origin. This for the elementary reason that Congress, to which the constitution gives "*all* legislative power," had made no law regulating the transit of oil, but virtually gave the president the right to legislate regarding it to suit himself.

In *Railroad Retirement Board vs. Alton R. R.,* 295 U. S. 330, the Railway Pension Act was overthrown by a 5-4 decision. In speaking of it to a railroad attorney I said that in the majority opinion Mr. Justice Roberts first tore the act into shreds, and then stamped and spat on the shreds, which I think is a fair summary of the decision. The dissenters thought that if a few extreme clauses were rejected the bulk of the act might stand, and especially urged that the majority went too far in holding that no railway pension act lay within the interstate commerce power. It would not surprise me if a fairer and more moderate bill were some day passed and sustained.

In *Louisville Land Bank vs. Radford,* 295 U. S. 555, the Frazier-Lemke amendment to the Bankruptcy Act in favor of farmer mortgagors was unanimously held unconstitutional.

Congress under the bankruptcy power may discharge the debtor's personal obligation, but it cannot take the creditor's secured rights in specific property. To do so would be to take one man's property and give it to another, and if public necessity should require such result, it could be legally done only under the eminent domain power and on payment of just compensation. This act has been redrafted by lawyers holding this decision in one hand and the Minnesota mortgage case in the other, and the lower federal courts are already at variance as to the validity of the new act.

As to the three gold cases in 294 U. S. (*Norman vs. B. & O. R. R.*, p. 240; *Nortz vs. U. S.*, p. 317; *Perry vs. U. S.*, p. 330), the syllabi alone cover seven pages; the cases themselves 140 pages; they touch the very foundations of government; how can one discuss them here? They are unusual because it is seldom that the court has to construe the power of Congress "to coin money, *regulate the value thereof*, and of foreign coin." Under this section the Court, by a 5-4 decision, upheld the various acts devaluing the dollar, calling in gold, and authorizing the payment of gold obligations, public or private, in the depreciated currency, dollar for dollar, but with one important qualification. Congress could not repudiate the promise to pay in gold, set forth in government bonds. To do so would destroy the faith and credit of the United States, pledged for these bonds, and might at some critical time result in the overthrow of the nation itself. The promise to pay in gold was that of a greater than Congress, viz.: the sovereign people, besides which, the 14th Amendment provides that "the validity of the public debt of the United States * * * shall not be questioned." However, said the court, if the treasury had paid gold to the holder of a government bond he would have had immediately to turn it back, and the currency he actually received was worth as much in purchasing power as gold, for any purpose for which he could lawfully use gold. Therefore, he sustained only nominal damages.

The conservatives considered this a quibble, and maybe it was. If the bondholder had been a nonresident foreigner and had been paid in depreciated currency, not circulating in his own country, instead of the gold his bond called for, he would have sustained a very substantial loss. It is worth

noting that Congress paid the Philippine government an extra amount in devalued currency so as to equal the actual loss sustained by the inflation, and has recently done the same thing with the Republic of Panama.

However, under the necessities of the case it is hard to see how the decision could have been otherwise. If the holders of many billions of bonds, public and private, could have enforced payment in current money of $1.69 for each $1.00 of their bonds, the new economic structure of the nation might have been totally wrecked. This is not a legal argument, but courts do not ignore such facts.

Few cases could be of greater public importance than the NRA decision (*Schechter Poultry Co. vs. U. S.*, 295 U. S. 495); yet the law involved was simple and the rejection of the act inevitable. So thought a unanimous court. Mr. Justice Cardozo filed a concurring opinion in which he flayed the act more cruelly than the others did. It is dead and gone now, and we need only note that it rested on two glaring errors. (1) Congress attempted to hand over its law-making power, first to various undefined trade groups or associations, and finally to the president, giving these delegates power to make codes having the force of law, although Congress had not defined what such law should be; (2) it empowered the president to assume complete control of every detail of trade and industry throughout the nation in a way that would have completely extinguished the reserved power of the states over their domestic affairs. It thus struck at the very foundation of our dual system. Even the chief justice, always moderate, was stirred by so unprecedented a measure, and asks whether anyone ever supposed that Congress could hand to any one man a roaming commission to dictate laws for all the industries of the United States.

If you care to read the act (48 Stat. L. 195) and the opinion you can decide for yourselves whether it was framed in ignorance of the constitution or in defiance of it. There used to be plenty of lawyers in Congress not without repute before they joined that body.

The next great case is that of Triple A (*U. S. vs. Butler*, 56 Sup. Ct. Rep. 312), usually called the Hoosac Mills case,

where the Agricultural Adjustment Act was held invalid on a 6-3 division, the three regular liberals dissenting. None of the recent decisions is more important legally and I wish there were time to analyze it. It is also novel, because the court has seldom had to consider the limits of the power of Congress under Art. 1, Sec. 8, of the constitution authorizing it "to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the *general welfare* of the United States." No term could be wider than "general welfare." Are there any bounds to what Congress may do within it through the medium of a tax with which it can buy or coerce obedience to its will?

Here the government urged that agriculture was essential to the general welfare and that therefore it could levy a tax to foster it. Plaintiffs contended that Congress' right to act in any direction was restricted to its specifically enumerated powers; in other words, that these powers covered and limited the general welfare for which it could tax and spend. The court rejected both views, holding that the power to tax is wider than the enumerated powers, yet is not unlimited. The cardinal and fundamental feature of our system is the dual government of state and nation, and the wide right to tax for general welfare is limited by the still wider restriction that Congress must not invade the reserved powers of the states. Powers not expressly granted to Congress are prohibited to it. No power is granted to regulate agricultural production; therefore, that power remains in the states and Congress may not assume it. Also, if Congress could do this with agriculture, it could equally control every field of trade or activity throughout the nation, and exact money from one branch of an industry in order to pay it to another.

There was a vigorous dissent and a lawyer whom I asked what he thought of the case replied that he had read the opinion and the dissent and thought they were both right. The gist of the dissent is that, admitting that Congress may not use tax money to *coerce* action in matters within state control, yet it is not debarred from *influencing* such action; that it has often done so under the interstate commerce and other powers, and that here the coercive effect of the act is not established but rests only on a process of speculative reasoning. It is evi-

dent that the majority felt that the vague authority to levy taxes to provide for the general welfare had to be defined and restricted. A broad interpretation of the words would allow Congress to do anything and everything. It might reduce or increase production, fix wages or hours, define conditions of employment, distribute the industrial population, raise or lower prices, regulate the professions or do anything whatsoever that it pleased by the simple device of levying a tax in such a way as either to purchase or compel compliance with its will. Thus it could destroy the police power of every state by occupying the field itself. Here again the decision was compulsory. There was a choice between rejecting the act or renouncing our dual system of government. It is interesting to note that abuse by Congress of the taxing power under this section was attacked in veto and other messages by presidents as diverse as Monroe, Jackson, Tyler, Polk, Pierce, Grant, Arthur, Cleveland and Harding.

The Tennessee Valley Authority case, *Ashwander vs. T. V. A.*, 56 Sup. Ct. Rep. 466 (Feb. 17, 1936), promised to be one of the first importance and was expected to decide the right of the federal government to go into business in competition with private light and power companies. However, the decision fell within narrow bounds and left this undetermined. It expressly states that no opinion is passed on the governmental power to operate distribution systems, or to build the three other dams now under construction, or as to what the government might do with the water power therefrom or as to the validity of the TVA act itself. All that it decides is that when the government builds a dam under the war clause and the commerce clause and generates thereby more electric power than it needs for war or commerce purposes, it can sell that power, under Art. 4, Sec. 3, of the constitution, authorizing Congress to dispose of the property of the United States, and since it can sell it, it can acquire transmission lines to carry it to market. The majority here was 8-1.

We know that the purpose of the TVA is to build other dams and create a vast system of generation and distribution in competition with private companies. The opinion is so carefully worded as to give little clue to the probable fate of the scheme when it comes before the court.

As you have noticed, many of these vital cases ring with dissent, and it would be interesting to know—what we never shall know—what takes place in the conference room. Occasionally the language of an opinion gives some hint. For example, in one of the New York milk cases Judge Cardozo, dissenting, describes part of Judge Roberts' opinion as "a juggling with words," and in the Triple A case Judge Stone, dissenting, says that part of the majority's reasoning "hardly rises to the dignity of argument." Of the present bench, Judge Cardozo commands the most picturesque English and is at times diffuse in its use. In one instance where he delivered the florid and very lengthy majority opinion, Judge McReynolds commenced his dissent with the curt remark: "This case has been greatly obscured by verbiage." Thus judges themselves remind us that they are human.

It was said earlier that dissent in the court is frequently due to the conflicting trends of thought of the different judges. This might be expanded a little. It is elementary that every intendment must be made in favor of the constitutionality of a statute. It must be accepted if by any reasonable construction of it or of the constitution it can be brought within the scope of that instrument. The court constantly announces this rule, and never more punctiliously than when about to declare a statute unconstitutional. Now, when a doubtful case comes before the court, I believe the conservative attitude is something like this:

"After all, the final responsibility is ours. This court is the designated interpreter of the constitution and the last resort of the people. If, by reason of some scintilla of doubt, we uphold an act which, on balancing reasons, we feel to be unconstitutional, we shirk our duty, and subject the people to an act of tyranny, for any act which Congress had no power to pass is necessarily such. We are bound, therefore, to reject the act, and leave Congress to pass another, clearly within constitutional limits."

The liberals, I think, reason somewhat as follows:

"'Congress which passed this act, and the president who signed it, are presumed to have judged it constitutional after due deliberation. To substitute our judgment for theirs, except in a perfectly clear case, is a usurpation of power. They, not we, represent the people; the responsibility for the act is theirs, not ours. The duty to refrain from thwarting the will of the people, as voiced by their representatives, is so impera-

tive, and the presumption of constitutionality is so controlling that, if we have any doubt whatsoever, we must uphold the act."

You see that both views are entirely reasonable and yet that, in a close case, they must inevitably clash.

However, when one reads these great cases together and not at long intervals as they appear, they fall into line, and form a straight course of singularly level-headed and even-handed adjudication. With our constitution as it is, it is hard to see how any one of the cases involving federal statutes could have been decided otherwise than it was. It is a small matter, but worth notice, that in only two of the great cases was there a 5-4 decision—the gold group where the act was sustained, and the railway pension case, where it was rejected. We have nine honest, resolute and very able men, representing the two main attitudes of human thought and constitutional construction, so evenly divided that the best reason can always command a majority over any unconscious bias. We are indeed fortunate in a time of popular ferment that the last word as to our rights rests with so sane and impartial a body.

In all this I am taking the constitution for granted. Whether it should be changed or not is another question, but how well the present instrument has served its intended purpose is seen from the vigorous words of John Randolph. Inquiring into the need of a restrictive constitution, and how the people had come to assent to it, he said:

"It was because of the radical depravity and original sin of their nature, which called for wholesome restraint. In a lucid interval, they had wisely determined to tie up the hands, not only of their agents, but themselves, that, when the hour of passion should come, barriers might be opposed to their inconsiderate rashness."

Bar Integration

By Carl V. Essery

Former President of the Michigan State Bar Association.

(Reprinted from the Journal of the American Judicature Society for April 1936.)

[The following address was delivered at a meeting of the Pennsylvania State Bar Association held at Bedford, Pa., on June 27, 1935. The address deserves the attention of all persons interested in this subject, and especially of those doubtful of the value of compulsory bar organization, but open to conviction. Mr. Essery, both before and at the time of his presidency of the Michigan State Bar Association, gathered material on this subject and enriched its literature. He has served as chairman of the committee on bar integration of the Conference of Bar Association Delegates.—Editor.]

All of us agree that the bar should make use of the form of organization which will enable it to perform its functions in the most efficient manner and with the maximum output of practical results. To say, however, that a certain form of organization is a superior form is merely to state a conclusion which carries little weight until we have defined the functions which an organized bar should perform, have analyzed the personnel of the bar—the units of the human machine which is to perform those functions,—and have evaluated the results which have been produced by the various types of bar organizations. Not until we have made these determinations can we conclude with reasonable certainty what form of organization is the best suited to the work of a state bar.

The functions of an organized bar are of two kinds: first, to see that the application of law, the operation of the machinery, which we call the administration of justice is conducted with competence and probity; second, to exercise constructive leadership in the never ending process of formulating law that will best answer social needs.

The first is the more important function for it bears directly on the primary work, the daily work of lawyers, that of service to their clients, and whether this service, with all the potentialities which it has for good or evil, is to be rendered in a proper manner, within proper limits,

and by a proper person. The duties which rest upon the bar in the performance of this function are to maintain a standard of legal education of such excellence and a bar examination mechanism having such efficiency that so far as is humanly possible those who are not qualified by training and character will be denied admittance; to develop and enforce a method of handling complaints against members of the bar that will result in elimination from the profession of those who prove unworthy, and, what is of equal importance, in composing the misunderstandings between lawyer and client in the many cases in which the complaint is unfounded; to formulate and keep apace with the needs of the times, rules of procedure and trial practice that are simple, fair, efficient and, so far as is consonant with justice, will promote the expeditious dispatch of the work of the courts; to guard the public and the practice of law against exploitation by lay agencies, whether these agencies be individual or corporate in character, as well as against exploitation by lawyers; to formulate and further methods by which selection for judicial office will be made with fitness for the office as the sole qualification.

The duties within the first function to the extent that enabling legislation may be required before the bar can perform them fully, have a social aspect but in their essence they belong to and are of the work of the bar and can be performed by an organized bar in better fashion than by any other group.

The second function is more social than legal in character. The duties incumbent on the bar in the performance of this function are to carry on research into the effect of existing laws, so far as such laws are within the province of the bar, to formulate any changes and revisions which these researches indicate are necessary, and to advocate their adoption by the appropriate governmental body.

The activities of bar associations and the extent to which lawyers have participated in government throughout our national history have precipitated lay thought as to the functions which the organized bar should perform. Today public opinion on this subject is crystallized. It lays the good works and the shortcomings of lawyers alike, whether they are those of the individual in private practice, or of the individual in government, or of some group within the profession, on the doorstep of an institution which the public, with the acquiescence of lawyers, has personified and calls the bar. The public believes that the group is responsible for the conduct of

the individual lawyer, that the individual lawyer is responsible for the work of the group, and in the main, that the group should perform the functions which have been described. The fact is that the public further expects the legal profession to carry on its work on a higher level than that which prevails in the community; and the nature of our work, in both of the functions described, is of such character that unless the profession makes every reasonable effort to that end it cannot retain the confidence of the public.

The bar to which the public looks for the performance of these functions, is regarded by the public as an institution, as something that has solidarity, whereas there are many forces in the profession which weigh against and but few forces which weigh for solidarity and group action. For example the bar in Michigan, to use round numbers, has 5,000 lawyers scattered over an area of 58,000 square miles, in Pennsylvania 8,000 lawyers scattered over an area of 45,000 square miles. The environments in which its members live and work range through the rural community, the small city, the city of medium size, the large city, and the metropolitan area, each with influences peculiar to itself which touch and have their effect on the views of lawyers toward matters which pertain to the bar. The types of work in which these lawyers engage vary even more than do their social environments. So greatly has the stream of law increased that no longer can a lone lawyer hope to practice law in all its branches. The general practitioner in law is going the way of the general practitioner in medicine. Specialization has laid its hands upon the bar and divided it into groups. The natural outgrowth of specialization is for the specialists to organize; this they have done and within the profession we have associations to which the members pay their first allegiance. Not even as to character of professional training can a majority of the bar be placed in one classification. It runs the entire gamut of good, better, best, and poor, poorer, poorest.

The inertia inherent in a large membership scattered over a wide area, and the divergence in viewpoints and in interests among the members caused by differences in environment, type of work, and educational background, always have and always will be present. These conditions always have and always will make difficult the satisfactory performance of the public functions of the bar, even by the best form of bar organization. The need is to be realistic and utilize the form of organization which will best minimize the adverse effects of these conditions.

The answer to the problem has been worked out by the American lawyer in the hard school of experience. Nurtured in the common law and having the traditions of the Inns of Court as part of its heritage it would seem that the all inclusive, self governing organization should have been the pattern for the American Bar from its beginning. But it was not so. The bar associations of late Colonial days, which attempted to follow this pattern, disappeared under the influence of the conditions and social philosophy which existed subsequent to the Revolution and for over seventy years the bar of this country was to all intents without organization of any kind. The few associations which were organized were aenemic and short lived. The notable exception was The Law Association of Philadelphia. Except for it and one or two others there is no association in existence today which antedates 1870.

It is unnecessary to dwell upon the low state to which standards of admission to the bar and standards of ethics within the bar fell during this period, except to say that it was these conditions which ultimately brought the better elements in the profession to the realization that they must organize if the bar was to be saved from a state of chaos. After 70 years of disorganization in the bar the task of building up a sense of group responsibility was bound to be difficult and long drawn out. The voluntary organization obviously was the only tool which held the promise of reasonable success in doing this spade work.

In 1870 a group of lawyers in New York City led the way by organizing The Association of the Bar of the City of New York, an association of the voluntary selective type. In the following decade several state associations and the American Bar Association, all founded on this pattern, came into being. By 1900 the idea of bar organization had been accepted in the profession and was looked upon with approval by the public. In all but a very few states there was a state organization and throughout the country the city and county associations were increasing rapidly in number. . . . By 1915 the harvest reaped by the state associations had reached the point at which it was feasible and also necessary to determine whether the methods and machinery in use were efficient, whether they were capable of carrying the continual increase in the load being placed upon the bar associations. In surveying the harvest it was found that the voluntary associations were responsible for much of the improvement that

had been made in standards of admission and professional ethics; that they had contributed much to improvement in procedure; that they had undertaken to perform a service, with some tangible results, in the field of substantive law; and that they had acted as a saline solution in reviving the ancient traditions of the bar. Their contribution to the profession is, perhaps, best reflected by visualizing what conditions would have been but for their efforts.

Giving due credit for all that had been accomplished, candor required the admission however that the work of the voluntary associations had not kept pace with the necessities with which they were and are confronted, that there were factors in the voluntary type of association, many of them inherent which always have and always will impede success in handling the problems of the bar under that form of organization. Some of these factors are:

(1) Inability to obtain more than a nominal membership.

According to the latest figures available there are but 7 states among the 32 states which still have the voluntary association, in which more than 50 per cent of the profession are members of the state association, namely, Delaware, Maine, Nebraska, Rhode Island, Vermont, Wisconsin and Wyoming. In the remaining 25 states the general average is less than 35 per cent. In my own state under the voluntary association and in Pennsylvania the average is only about 25 per cent.

(2) The inadequate financing which necessarily results when a small group undertakes to carry a burden which should rest on the entire profession.

By way of contrast, in the 16 states which have the integrated bar the total number of lawyers who are contributing in dollars to the work of the bar is substantially equal to the total membership of the voluntary associations of the remaining 32 states, plus the District of Columbia.

(3) The waste in time and effort required to maintain even a nominal membership of 25 per cent or 30 per cent of the profession.

(4) The inability to mobilize the bar as a whole in support of desirable projects. The charge that the voluntary association represents but a minority of the profession, has all too often proved to be an insurmountable hurdle.

(5) The difficulty in coordinating its activities with those of the local associations.

(6) The difficulty experienced in interesting

new members of the profession in the work of the bar association.

(7) The difficulty experienced in bringing the full weight of the bar to bear upon the problems of admission and discipline.

(8) The necessity of depending almost entirely upon voluntary services.

The conclusion was unavoidable that in proportion as the load increased the defects mentioned would tend more and more to minimize the effectiveness of the voluntary associations, that some refinements must be made in bar organization, and possibly that a new model would be required. Two schools of thought developed. One school felt that a system of affiliation between the existing state and the local associations would remedy conditions. This system tended toward a more inclusive membership and greater unity and implied some relaxation of the selective principle but complete retention of the voluntary principle. The other school regarded the affiliation method as a material improvement but nevertheless one which was bound to be temporary in character. It looked to the integrated, then known as the incorporated or statutory bar, as furnishing the better answer to the problem. The inspiration for this concept of bar organization was indirectly the all inclusive, self governing bars of England and the Continent, but the direct inspiration was the Act passed in 1797 creating the Law Society of Upper Canada, under which the lawyers of Ontario have ever since governed their affairs.

The affiliation method has been tried in Washington, Oregon, Minnesota, Wisconsin, Pennsylvania, and in the western part of New York. Recently it has been put into effect in New Jersey, Florida and Connecticut. In every state in which it has been tried it has without question resulted in an improvement in the work of the bar and has measurably increased the influence of the state association. It is, however, based upon the voluntary principle and for that reason is subject, though to a lesser extent, to the same weakness which hampered the work of the unaffiliated voluntary association. In appraising this form of organization there are certain results which cannot be ignored; first, after operating for several years under the federated bar Oregon and Washington adopted the integrated bar and the Minnesota and Wisconsin associations endeavored this past winter to obtain the adoption of bills to integrate the bars of those states; second, the problem of obtaining and retaining members is still present; third, it has not made possible the transfer of the detail work of the association

to executives employed on full time; and, fourth, it has not lessened materially the financial problem. While adequate income is not the most important factor in determining how successful a state bar is to be, neither is it the least important factor. As an illustration, what voluntary state association is in position to appropriate $10,000 for the work of its committee on unauthorized practice of the law, and to appropriate $6,000 for a survey of legal education? The Integrated Bar of California has done both of these things. In addition it has a full time executive staff, and a research assistant at each of the three leading law schools of the state paid by the State Bar.

The first suggestion that integration of the bar could and should be accomplished in the several states by an appropriate statute was made by the American Judicature Society in January, 1914. The same year the President of the Wisconsin Association, Mr. C. B. Bird, devoted his annual address to this subject. In 1915 Herbert Harley addressed the Bar Association of Lancaster County, Nebraska, on the subject. In its Journal for December, 1918, the American Judicature Society submitted a model bill. This plan was considered by the Conference of Bar Association Delegates at the meeting of the American Bar Association at Boston in 1919, a committee was appointed, and at the 1920 meeting this committee submitted a second model bill. The two model bills which were essentially the same in their purposes and in the duties and the powers which they sought to vest in the bar have furnished the general pattern for most of the bills which have been drafted and for all but three of the acts which are in effect.

The first state to give official recognition to the integrated bar was North Dakota, which in 1921 passed what is known as the North Dakota Bar Association Act. This Act, which is one of the three exceptions noted, simply created an association to which all of the lawyers in the state were required to belong and provided for its support out of the annual dues fixed in the Act. The first states to accept the complete principle of the integrated bar and invest the new association with specific duties and powers were Alabama and Idaho whose acts were passed in 1923. Then followed New Mexico in 1925, California in 1927, Nevada in 1928, Oklahoma in 1929, Utah and South Dakota (whose act confers rather limited powers) in 1931, Mississippi in 1932, Washington, North Carolina and Arizona in 1933, Kentucky in 1934, and Oregon and Michigan in 1935.

The Acts naturally vary in mechanical details but in general the provisions of a typical act may be summarized as follows:

It creates a public association known as the State Bar whose purposes are (1) to aid in the advancement of the science of jurisprudence and in the improvement of the administration of Justice; (2) to supervise, under the direction of the Supreme Court, admission into the bar and the administration of discipline within the bar. Membership is compulsory and is of two kinds, active and inactive. Only active members are permitted to practice law. Inactive members are those members who request a transfer to the inactive list. Payment of annual dues, which range in the various states from $2.00 a year to $10.00 a year, is required. On non-payment the delinquent member may be suspended from practice until the dues and the penalty provided for in the act are paid.

Government is of the representative type. It is vested in a Board of Governors whose duties and powers are defined in the act. The governors are elected by districts; nominations are by petition and the election is by ballot sent out and returned by mail, generally immediately prior to the annual meeting of the association The officers as a rule are elected by the Board. Ample provision is made for the appointment of committees and particularly what is known as Local Administrative Committees to whom the Board generally delegates the handling of matters of local interest such as investigation of grievances and complaints.

The Kentucky Act was the first one which departed completely from the traditional form. This act simply authorized the Court of Appeals of Kentucky to promulgate rules for the organization and government of the bar. It has however two unfortunate provisions, one which restricts the right of the court to define the practice of law and one which limits the dues to $2.00 a year. Both restrictions were forced by opponents of integration, principally by lay agencies, in the hope, which has not materialized, that they would cripple the association. The rules promulgated by the Court of Appeals set up a complete organization and the effect which this act has had in Kentucky may be judged from the fact that over 900 members attended the first Annual Meeting.

The Michigan Act, adopted in May of this year, is based on the Kentucky Act but as it is broader and even more concise, I will take the liberty of reading it in full.

"Section 1. There is hereby created an association to be known as the state bar of Michigan, the membership of which shall consist of all persons in the state now or hereafter regularly licensed to practice law in this state.

"Section 2. The supreme court is hereby authorized to provide for the organization and regulation of the state bar of Michigan; to provide rules and regulations concerning the conduct and activities of the association and its members; the schedule of membership dues therein, which dues shall not exceed five dollars per annum, non-payment of which shall be ground for suspension, the ethical standards to be observed in the practice of law, and the discipline, suspension or disbarment of association members. Under such regulations and restrictions as the supreme court may prescribe, the power of subpoena may be conferred upon the association or its officers and committees for the purpose of aiding in the cases of discipline, suspension or disbarment; the rules promulgated by the supreme court and the proceedings and records of the state bar association to be published by the judicial council of Michigan and in the Michigan reports and advanced sheets thereof."

This type of act makes possible a more flexible organization than where the mechanical details are set forth in the statute. It requires and should result in closer cooperation between the court and the bar, and if it proves as successful in Michigan as in Kentucky, the future trend in bar acts will undoubtedly be to this type.

During the past three years integration by court rule under the rule making power rather than pursuant to statutory mandate, has also been much bruited. In 1933 the Supreme Court of Illinois, acting under the rule making power and in response to a petition filed jointly by the Illinois and the Chicago Bar Association issued an order in which it gave these associations disciplinary powers not only in respect to their members but in respect to all members of the bar in Illinois. Last year the Supreme Court of Missouri, which had held in the Richards case (63 S. W. 2d, 672) that it had inherent power to regulate the practice of law in Missouri independent of statutory provisions, promulgated a rule on the petition of the State Association whereby it established a bar committee of four members in every Judicial Circuit to handle disciplinary matters subject of course to the supervision of the court, and by fixing a fee of $3.00 a year to be paid by every lawyer in Missouri to cover the expenses of this work, took a much

longer step than had been taken by the Illinois court in 1933.

In no state, in the absence of a permissive statute such as exists in Michigan and Kentucky, has integration of the bar in respect to all of its functions been prescribed by court rule. The farthermost outpost today of integration under the rule making power are the functions which relate to admission into the bar and discipline within the bar. Personally I am of the opinion that it is unwise to press integration through the rule making power beyond those functions; that the bar which desires to set up, in cooperation with the Supreme Court, an organization which is integrated as to all its functions will be on much firmer ground if it proceeds under an act of the Kentucky and Michigan type.

In its earlier days the integrated bar was objected to on the grounds that it was unconstitutional, that it could not create a new spirit of cooperation among those who had refrained from joining the voluntary association, that through its compulsory features it would enable the unfit to dominate the association, and that it would result in loss of interest and gradually become a perfunctory organization.

The objection that it was unconstitutional has long since been settled. In every state in which this question has been raised the act has been sustained as to every phase. . . . . If the integrated bar had not lived up reasonably well to the predictions of its sponsors, if it had failed to bring about an increase in interest among its members, if it had fallen into the control of the unfit and on evil days, the press, which has never dealt over tenderly with the bar, would have criticized, and of course should criticize it freely. On the contrary the press has looked upon the work of the integrated bar and called it good. The most persuasive evidence as to the view held by the press is the fact that efforts of a bar association to obtain the passage of a bill to integrate the bar uniformly have the support of the press, support which is based on what the press in the integrated states thinks about this form of bar organization and in some instances, as with one of the papers in Michigan, on the report brought back by reporters sent at the expense of the newspaper to make a firsthand survey of the results obtained.

That the majority of lawyers, in fact the great majority of lawyers, in the states having the integrated bar give it their firm approval is undeniable. The Michigan committee in 1931 wrote to every member of the Russell Law List in the states then having an integrated bar, 302 letters

in all, requesting their comments on the Act. One hundred sixty-one replies were received of which 135, or over 85 percent, expressed approval, 14 expressed disapproval and 12 had not as yet formed an opinion. The Wisconsin committee in 1934 made a similar inquiry, using a different law list than that chosen by the Michigan committee, from which to pick out the lawyers to be addressed. It received 64 replies from 53 different localities in 13 different states. Of these letters 2 were opposed to the integrated bar, 3 were lukewarm, and 56 were in hearty approval of this form of bar organization. This past winter a member of the Wisconsin bar who was not in favor of integration made his own investigation by writing to a hand-picked list of 100 lawyers in integrated bar states. He received 60 replies, only one, of which expressed dissatisfaction. The lawyer in question thereupon notified the Wisconsin committee that he had changed his opinion and would support the bill.

The most graphic illustration of the view of the lawyers is however their attitude when attempts are made to repeal a bar act. Four such attempts have been made. In South Dakota the repeal bill was defeated by a vote of two to one. In Oklahoma in 1933, 90% of the members of that bar signed a memorial to the Legislature protesting against repeal of the bar act or any modification which would weaken the organization. This year another attempt was made to obtain the repeal of the Oklahoma act and again the opponents received a thorough-going defeat. In California a plebicite was held by a committee of the legislature this past winter. The question on the ballot submitted to the bar was: "Do you favor repeal of the State Bar Act?" The results of this plebicite were 1899 in favor of repeal and 5457 against repeal of the bar act. It is to be assumed that the 25% of the bar who did not vote in this plebicite are not dissatisfied with the integrated bar or they would assuredly have made use of this opportunity to express dissatisfaction. A statement that the integrated bar has increased interest among the members of the profession in the work of the bar in those states in which it has been tried, that it has produced more results, than any other form of organization has ever produced. and that it has stimulated rather than decreased interest in the local associations is a statement which will stand the test of examination.

These comments on bar organization I trust you will receive as being directed to the institution as such and not to the work of a specific association, that they are not intended as an ap-

praisal of the work of your association. While I have some knowledge of the good work which has been done in Pennsylvania, it would be presumptuous for me, an outsider, to attempt to appraise its value; and in addition it is a fundamental truth that the type of bar organization which is best fitted to the needs of a particular state is a matter which is to be determined by the lawyers living in that state and in the light of their own traditions and necessities.

In the work of the bar there can, however, be no let up if the results are to be satisfactory. It must be carried on under sustained pressure. To do this, to lay out new projects, supervise and coordinate the activities of committees, organize meetings, direct research work, maintain contact between the several agencies within the bar and with the several branches of government, and carry on the many other tasks with all the wealth of detail they involve, requires the services of a trained secretarial and research staff employed on full time and financial support that is adequate in amount and certain of receipt. Lawyers as a class are men of moderate circumstances. The amount of time and the financial contribution which any one man or any group of men can give to the work of the profession is limited, nor should any one man, or any group of men be expected to carry the burden. If the right to practice law is a valuable right, if it is impressed with a public interest and to be exercised with due regard for the public interest, then everyone who possesses this right should be charged with an equal share of the burden, both in time and money, of carrying on the public functions of the institution called the bar.

I suggest to you therefore that a form of bar organization which is in successful operation in 16 states and which has been approved by the voluntary associations of 14 other states to the point of endeavoring to obtain the passage of a bar act, calls for conscientious examination before arriving at your answer to the problem of bar organization. The influence for good which 48 state bars equipped for research and study, bars which have the machinery for determining the views and sentiments of the entire profession on vital matters, bars which will be able to speak with a voice of authority and make themselves felt in the shaping of the law, would have in their respective states and the influence which such bars, working through a house of delegates in the American Bar Association, would have upon the national structure, moves the spirit to strive for goals which grip the imagination.

MASSACHUSETTS IN THE SUPREME COURT OF THE UNITED STATES AND IN THE OFFICE OF ATTORNEY GENERAL.

By JOSEPH A. CONRY, *Special Assistant to the Attorney General.*

The proper division and distribution of the fruits of man's labor in agriculture, commerce, banking and industry, among those who have toiled in production, has for centuries been the cause of bitter conflict among the different elements or social groups which form that entity we know as the state.

Recent attempts at legislation in the United States approved by the legislative and executive branches of our government and intended to equalize the burdens of economic life, fell before the keen scrutiny of the Supreme Court into that class known as unconstitutional acts.

As a result of several decisions of the Supreme Court, a congressional restlessness has developed into an agitation looking for some sort of restriction upon that court. Upwards of forty bills have been presented in Congress, some representing open hostility to the court, while others merely provided for a limitation upon the power of the court to declare an act unconstitutional.

Fifteen years before Marshall declared his views in *Marbury* v. *Madison,* our own Samuel Adams in the Massachusetts convention called to consider the ratification of the proposed United States Constitution on February 1st, 1788, said:

> "If any law made by the Federal Government shall be extended beyond the power granted by the proposed Constitution and inconsistent with the Constitution of this State, it will be an error and adjudged by the courts of law to be void." (2nd Elliotts Debates, page 131; Debates and Proceedings of the Massachusetts Convention of 1788, page 233.)

Daniel Webster in 1826 offered a bill to increase the number of members on the Supreme Court from seven to ten. Webster endorsed Marshall's doctrine as to the power of the Court. He said, "It is the theory and plan of the Constitution to restrain the Legislature as well as other departments and to subject their acts to judicial decision whenever it appears that such acts infringe constitutional limits."

Marshall had implicit faith in the legal knowledge and literary skill of his colleague from Massachusetts and when he had arrived at a legal conclusion he would submit his finding to Story, saying: "There is the law, now you fashion it with the authorities." One hundred years after Webster declared for Marshall another Mas-

sachusetts Senator, David I. Walsh, delivered a spirited address saying: "The Constitution is the guardian of the liberties of every individual under the flag and is the stabilizing influence that has contributed most to our national expansion and progress."

Webster was the great expounder of the Constitution, and from his day to the present Massachusetts has always rendered intelligent interpretation of, and strongest support, to that noble instrument.

The Judiciary Act approved by President Washington September 24, 1789, provided for a Supreme Court of the United States under the mandate of the Constitution (Article 3, Section 1) to consist of a Chief Justice and five associates.

The same day the President sent to the Senate the names of his appointees,—John Jay of New York; C. J. John Rutledge, South Carolina; William Cushing, Massachusetts; Robert Harrison, Maryland; James Wilson, Pennsylvania; and John Blair, Virginia.

Cushing was born in Scituate in 1732,—graduated from Harvard in 1751. His father was a Justice of the Superior Court in Massachusetts until 1771, when he resigned, having been assured that his son would be appointed to succeed him. The son was learned in the law and likewise noted for his elegant personal deportment. He acted as Chief Justice in the absence of Jay, who spent much time abroad or in campaigning for Governor of New York, an office Jay considered to be of greater importance than Chief Justice. Cushing was appointed Chief Justice, January 26, 1796; was confirmed by the Senate the next day, but declined the honor a week later, preferring to remain as Associate Justice. He wrote many opinions, the two of historic value being *Chisholm* v. *Georgia*, 2 Dal. 466, which was the direct cause of the Eleventh Amendment to the Constitution, and *Ware* v. *Hylton*, reported in 3 Dal. 281. He administered the oath to President Washington on his second inaugural. He was an excellent representative of the best legal training then existing in Massachusetts.

To succeed Cushing, Madison appointed three men, two of whom declined the honor before he nominated Joseph Story. He appointed Levi Lincoln, January 2, 1811, who was confirmed by the Senate, but declined the honor the following week.

Madison then appointed John Quincy Adams (our Minister to Russia) February 21st, confirmed by the Senate the next day, only to be declined some months later. Alexander Wollcott was also appointed, but rejected by the Senate.

It was not until November, 1811, that Madison finally decided upon Joseph Story, superb lawyer-scholar born in Essex County in 1779, graduating from Harvard in 1798, and at 32 years of age began his distinguished judicial career, extending over a period of 34 years, gathering world-wide fame as Judge and legal commentator, during which time his contributions to the science of law were not surpassed if equalled by any judge in England or America. Precocious as a student, he was prodigious as a worker, his career being an inspiration for every law class in America. An entire volume of the QUARTERLY could not contain more than a passing reference to the genius of Story. Webster said that the dissenting opinion in *Charles River Bridge* v. *Warren Bridge*, reported in 11 Pet. 419, was the best and ablest opinion Story ever prepared.

When the Hon. James M. Beck last appeared to speak before the Bench and Bar of Massachusetts, he made pleasant reference to the celebrated controversy surrounding the Girard Will case, 2 How. 127, in which Horace Binney overwhelmed our immortal Webster. The validity of the will was in question. Binney was for the will, submitting a most comprehensive brief, containing more than a dozen pages of citations to sustain his contention. Webster made an eloquent argument picturing the glory of the Christian doctrine, but was reluctant about legal precedent. He was a spendthrift in assertion but penurious in citations. It seemed to him as though his argument alone should be sufficient as he concluded by saying: "If the court should set it aside (the will) and I should be instrumental in contributing to that result, it will be the crowning mercy of my professional life."

Justice Story worshipped Daniel Webster, but his devotion to the law was supreme. He must have felt sympathy for Webster as he said in rendering the decision: "It is the unanimous opinion of the court that the decree of the Circuit Court of Pennsylvania, dismissing the bill, ought to be affirmed, and it is accordingly affirmed with costs."

Benjamin R. Curtis, born in Watertown in 1809, graduated from Harvard in 1829, was probably the most conspicuous member of a family always prominent in the intellectual life of Massachusetts. He fought his way to success in the trial courts of Suffolk, gaining the warm approval of Daniel Webster, who urged him for selection to the Supreme Court, to which he was appointed in 1851. He sat during the famous *Dred Scott* case (19 How. 393) and rendered decisive dissent to the celebrated opinion of Taney, C. J. His brother, George Ticknor Curtis, was of counsel for the colored

man. Shortly after, Curtis retired from the Supreme Court to take up his private practice, which immediately became exceedingly valuable. When President Johnson was impeached, Curtis was selected "by common consent" to handle the case for the President. After his acquittal, Johnson offered Curtis the post of Attorney General, which was promptly declined. He was subsequently invited to represent the United States at the Geneva Tribunal, which honor he also set aside. No finer type of lawyer, advocate and gentleman ever appeared in American public life.

Horace Gray was born in Boston in 1828, graduating from Harvard in 1845 at the early age of 17. It was three years later, in 1848, when he entered law school, being admitted to the bar in 1851. Six years after, he formed a partnership with E. R. Hoar, which lasted only two years. In 1864, he was appointed associate justice of the Massachusetts Supreme Court, becoming Chief Justice in 1873, at a time when the Supreme Court had original jurisdiction in tort and contract and exclusive jurisdiction of suits in equity, of libels for divorce and for indictment for capital offences. He wrote more than thirteen hundred opinions during the seventeen years that he served on the Massachusetts Supreme Court. On December 19, 1881, he was appointed to the Supreme Court of the United States on the recommendation of Senator George F. Hoar, and was confirmed by the Senate the next day. He enjoyed a reputation for profound scholarship and devotion to his judicial duty. He was honored by an invitation from the Bar Association of Virginia and the Bar Association of Richmond to deliver a formal address on John Marshall in 1901, which oration takes front rank among all of the eulogies delivered upon our distinguished Chief Justice. His decision in *Briggs* v. *Lightboats*, 11 Allen 157, is worthy to be placed alongside of John Marshall's celebrated opinion in *The Schooner Exchange*. He wrote the powerful dissenting opinion in *United States* v. *Lee*, 106 U. S. 196, where his clear language illuminates the principles of government immunity.

Oliver Wendell Holmes, Jr., was born in Boston in 1841, graduated from Harvard in 1861, entering the Union Army for a brilliant record. Upon his return to Massachusetts, he took up the practice of law, joined the Harvard Law School Faculty and about a year later became a Justice of the Massachusetts Supreme Court in 1882, and Chief Justice in 1899. Theodore Roosevelt appointed him to the Supreme Court on August 11, 1902.

His legal career is so familiar to all of the present generation; his delightful literary skill, whether in shaping judicial opinions

or writing treatises, is so universally admired and his memory so affectionately cherished, but little may be added to what has been already written; sufficient for us to assert his scholarship was not surpassed by any man who ever served in the Supreme Court of the United States.

William H. Moody was born in Newbury, Essex County, in 1853, and graduated from Harvard in 1876. He early won a high reputation at the Massachusetts Bar as a vigorous trial lawyer. He was a member of Congress 1895–1902, attracting the favorable attention of Theodore Roosevelt, who recognized in Moody many of his own energetic qualities. He appointed Moody as Secretary of the Navy, May 1, 1902, Attorney General, July 1, 1904, and Associate Justice of the Supreme Court in December, 1906, but unfortunately failing health compelled his early retirement. He served until 1910, when he retired under the provision of a special act of Congress. Roosevelt was very fond of Moody, never losing an opportunity to say pleasant things about him and praising his ability as a lawyer. He had an incisive manner of speech, with rare faculty for clear statement. Within the brief period of five years he had the uncommon experience of serving in the three recognized branches of our government: legislative, executive and judicial.

Louis D. Brandeis graduated from Harvard Law School in 1877, and since that time, although not of Massachusetts birth, has claimed that state as his legal residence. He was appointed to the Supreme Court by President Wilson, January 28, 1916. His appointment was vigorously opposed by various elements throughout the country, and it was not until June 1, 1916, that he was confirmed by the Senate. He is rated at the present time as the leading Liberal of the court, with most advanced sociological views, exceedingly well read in law, literature and legislation. He is today the oldest man on the bench, having been born November 13, 1856.

Attorneys General.

The first man from Massachusetts to occupy the position of Attorney General of the United States was Levi Lincoln—born in Hingham in 1749, graduating from Harvard in 1772. He possessed the full confidence of Thomas Jefferson, who appointed him Attorney General in 1801, where he remained until 1804. Jefferson was anxious to retain him in Washington and urged Madison to appoint him to the Supreme Court, which Madison did, and

he was confirmed by the Senate but declined the honor. His work as Attorney General was not at all onerous as he was occupied with routine work concerning land grants, pensions, etc., rendering only about a dozen opinions during the entire term as Attorney General, one only of which may be read today with interest. The British Minister at Washington had hired a runaway slave and felt highly incensed when the owner recaptured the slave and took him home. The Minister asserted that his privileges as a diplomat had been abused, so Lincoln wrote a soothing opinion to the Secretary of State, which amicably closed the incident.

By way of contrast and showing the growth of the country, Caleb Cushing, the second Attorney General from Massachusetts, appointed half a century after Lincoln had retired, submitted opinions that filled three volumes with 2,136 pages, Vols. 6, 7, and 8, Op. A. G. Cushing was born in Salisbury, Essex County, in 1800, graduating from Harvard in 1817. His article on Neutrality, Vol. 7, Op. A. G., 122–132, is worthy of close study today as an intelligent survey of a most involved subject. In Vol. 8, Op. A. G. 175, he introduced the word "arcifinious", meaning a frontier which forms a natural defense, using this term in connection with the boundaries between Mexico and the United States. He was nominated January 9, 1874, when 74 years of age, by President Grant to be Chief Justice of the Supreme Court, but political squabbles demanded withdrawal of his name from consideration of the Senate, as rejection seemed inevitable.

Ebenezer Rockwood Hoar, brother of our former Senator, George F. Hoar, was born in Concord in 1816, graduating from Harvard in 1835, and after lively and valuable training in the trial of causes and turmoil of politics, he served as a judge of the Court of Common Pleas from 1849–55 and as associate justice of the Supreme Judicial Court from 1859 to 1869. He was appointed Attorney General by President Grant in March, 1869. He had a very turbulent career during his short term in office owing to the reconstruction legislation and also it may be said that his relationship with the Senate did not accrue to his advantage. Congress had authorized the creation of nine new circuit judges, and in appointing these judges President Grant relied largely on the recommendation of Mr. Hoar, who rarely found himself in harmony with the senators who had favorites to reward.

The Legal Tender Cases—*Hepburn* v. *Griswold,* 8 Wall. 603

were first argued in December, 1867, and were re-argued in December, 1868, a few months before the appointment of Mr. Hoar. The court delayed its decision until February 7, 1870, when by a four to three vote, the court declared the Legal Tender Act unconstitutional. By a strange coincidence the very day the decision was rendered, President Grant sent to the Senate the appointment of two new judges (Strong, confirmed February 18, Bradley, confirmed March 21).

A couple of months before these appointments, on December 15, 1869, President Grant nominated Hoar for the Supreme Court and the Senate rejected him on February 3, 1870. Four days after the confirmation of Bradley on March 25, 1870, Hoar moved before the new court to re-open the Legal Tender Cases. The court took his motion under consideration and while there was decisive objection on the part of some justices, the court gave excellent reason for re-hearing in 12 Wall. 529. The court granted a re-hearing on May 1, 1871. Hoar's action on the appointment of judges as well as his activity in connection with the Legal Tender Cases, exposed him to considerable hostility and his career as Attorney General was marked with more bitter bickerings than attended any other occupant of the office. He was the second nominee for the Supreme Court submitted by President Grant to be rejected by the Senate. He resigned as Attorney General June 1, 1870, and returned to Massachusetts where he was deservedly held in the highest esteem. He lived to see his son, Sherman Hoar, elected to Congress in 1890 as a Democrat.

Charles Devens was born in Charlestown in 1820, graduated from Harvard in 1838, and entered into the practice of law in Franklin County in 1841. He had a high and honorable record as office holder. He was elected to the State Senate for two terms, 1848–1849, and then appointed United States Marshal 1849–1853. The next year he opened a law office in Worcester, entering into partnership with George F. Hoar, and then became City Solicitor of Worcester, for three years. He joined the Army in 1861, as Major, quickly promoted to Colonel, then Brigadier General and Major General at the capture of Richmond, of which city he became Military Governor. He remained in the Army until 1866, when he returned to Worcester to practice law with his old partner, Senator Hoar. In 1867 he became a justice of the Superior Court, and in 1873 was promoted to be a justice of the Supreme Judicial Court. In 1877 he was appointed Attorney

General by President Hayes, remaining in the Hayes cabinet until 1881, when he returned to Massachusetts and was re-appointed justice of the Supreme Judicial Court, which office he held until his death in 1891.

At the 250th Anniversary of Harvard, in 1886, Devens was the presiding officer of the exercises. Three years after his death, the Massachusetts Legislature appropriated $15,000 for a bronze monument, which now stands in the State House grounds as a perpetual tribute to his memory. At the outbreak of the World War, the United States Army Camp at Ayer was named Camp Devens. He was a man of unusual charm of manner, making a deep impression on the Supreme Court, because of his dignified presence, oratorical power and profound knowledge of the case under consideration. He was the only man in Massachusetts who combined recognized skill in military matters with honored leadership at the bar.

Richard Olney was born at Oxford, Massachusetts, in 1835, graduating from Brown University in 1856 and Harvard Law School in 1858. He essayed a modest venture in politics in 1873 by being elected to the legislature from West Roxbury. He tried again in '74 and '75, being defeated each time. In 1876 he was a candidate for Attorney General of the state and again defeated. After that he abandoned active participation in politics, devoting himself to an intensive study of all the cases as they were reported from the state and federal courts. He acquired a high reputation at the bar, so that his selection by President Cleveland in 1893 for Attorney General was generally approved. Having been trained in the disposal of cases of magnitude, he entered the office of Attorney General with decisive ideas as to the conduct of the office. It was to be executive work, with the trial of cases in the hands of the Solicitor General, or other assistants. With that idea in mind, Olney appeared in the Supreme Court in but two cases, the Debs case and the Income Tax cases, both of which are instantly recalled as the most important cases in the closing half of the 19th century. Labor troubles took first place in American attention in 1894, the climax coming with the strike of the American Railway Union in Chicago. Olney demanded that the rights of the United States be maintained in the face of all conflict, and when this governmental power was demonstrated, there was an end to the strike. The equity power of the government to interfere by injunction in a clear case of threatened irreparable

injury was determined by the court, and that power is in the Code today, Title 29, Sec. 52. The Debs case as reported in 158 U. S. 577–600, represented the unanimous opinion of the court, an interesting, if not remarkable, fact considering the inflamed state of public opinion of the time.

Olney argued the Income Tax cases which claimed almost as much attention as the Debs case. They are reported in the same volume of reports, 158 U. S. 601–715. The act was held to be unconstitutional by 5 to 4. It may be recalled that the Legal Tender cases were first held unconstitutional and later the court reversed itself. Olney's views on the Income Tax were sound when he sought to convince the Supreme Court, and, subsequently, his views became the law of the land. After two years as Attorney General he was promoted to the office of Secretary of State and immediately became an international figure. He remained in office until the end of the Cleveland administration. He was the choice of Massachusetts Democrats for President in 1904 and was tendered by President Wilson the post of Ambassador to Great Britain, which he declined.

Olney had such a complete command of legal philosophy combined with thorough knowledge of political history and experience of so varied a character that he was readily accepted as a leader of the ablest lawyers in America.

SUMMARY.

Massachusetts men who have served as members of the Supreme Court of the United States and their terms:

WILLIAM CUSHING .....1789–1810.
JOSEPH STORY .....1811–1845.
BENJAMIN R. CURTIS .....1851–1857.
HORACE GRAY .....1881–1902.
OLIVER WENDELL HOLMES, JR. .....1902–1932.
WILLIAM H. MOODY .....1906–1910.
LOUIS D. BRANDEIS .....1916–Up to now.

Massachusetts men who have served as Attorney General:

LEVI LINCOLN .....1801–1804.
CALEB CUSHING .....1853–1857.
CHARLES DEVENS .....1877–1881.
E. ROCKWOOD HOAR .....1869–1870.
RICHARD OLNEY .....1893–1895.
WILLIAM H. MOODY .....1904–1906.

THE PLAN FOR REORGANIZATION OF THE AMERICAN BAR ASSOCIATION TO BE SUBMITTED AT THE MEETING IN BOSTON ON AUGUST 24th, 1936.

The American Bar Association was organized in 1878 with a membership of about four hundred. It has gradually developed into a body of approximately thirty thousand lawyers from all parts of the country, having sections and committees dealing with many branches of the law and of its administration, but its structure is cumbersome and not well adapted to effective representation of the bar of the country as it should be. Ever since Mr. Root was president in 1916 when a preliminary step was taken by the organization of the Conference of Bar Association Delegates (see *American Bar Association Reports*, Vol. 41 for 1916, pp. 588–601), plans have been discussed for improving this condition of the association. The Conference of Bar Delegates has served as a forum for the discussion during the past twenty years.

A special Committee on Co-ordination of the Bar has finally presented a carefully prepared plan for a representative government of the association which was mailed to all members some months ago for criticism. This plan, as revised in the light of such criticism, will be submitted for consideration at the meeting on August 24th, 1936. We believe it should be adopted and urge all members of the American Bar Association in Massachusetts to attend the meeting and support the proposed revision of the constitution and by-laws of the association which will be submitted to carry out the plan.

As the proposed constitution and by-laws cover thirty pages, the substance of the plan is briefly stated for the information of Massachusetts members as follows:

The control and administration of the association will be vested in a house of delegates, subject to the possibility of a referendum to the membership on matters of policy, etc.

It is important that members of state and local bar associations should understand clearly section 2, which provides as follows:

> "*Section 2. Autonomy of State and Local Bar Association.*
>
> "Nothing contained in the Constitution or By-Laws, and no action or recommendation of the House of Delegates, the

Assembly, or the Board of Governors, or of any referendum, shall be construed to bind or commit in any respect any State or local Bar Association or to obligate such State or local Bar Association to accept or carry out any policy or recommendation of the House of Delegates or other agency of the American Bar Association. The membership and participation of any State or local Bar Association in the House of Delegates shall be at all times voluntary and shall not subject such State or local Bar Association to any financial or other obligation or liability except such as it may voluntarily assume."

The house of delegates will be composed of one state delegate from each state, chosen by mail ballot of the members of the American Bar Association in such state; one state bar association delegate chosen in such manner as the state bar association shall determine; one delegate for each local association having 800 or more members, 25% of whom are members of the American Bar Association; 5 delegates of the American Bar Association chosen by the assembly of the members; 1 delegate each from the American Law Institute, the American Judicature Society and any other national organization having an individual membership 25% of whom are members of the American Bar Association and which shall be approved by the house of delegates for affiliation with the American Bar Association. In addition to these delegates, the following persons will be *ex officio* members—President of the National Conference of Commissioners on Uniform State Laws; Chairman of the National Conference of Bar Examiners; Chairman of the National Conference of Judicial Councils; President of the Association of American Law Schools; Attorney General of the United States; Solicitor-General of the United States; President of the National Association of Attorneys General; the chairman or in his absence the vice-chairman of each section of the American Bar Association; the President, Secretary and Treasurer of the Association and the members of the Board of Governors.

The Board of Governors, which is to be the administrative board with the broad powers of an executive committee, subject, of course, to the by-laws and the votes of the house of delegates, will consist of—the President of the Association, the Chairman of the House of Delegates, the last retiring president, the secretary, the treasurer, and the Editor-in-Chief of the *American Bar Association Journal*, all *ex officio*, together with one member from each Federal Judicial Circuit to be chosen from the members of the house of delegates.

The house of delegates will meet each year at the time of the annual meeting and at such other times and places as it may determine.

The members of the association will also meet at the time of the annual meeting in assembly for the discussion of recommendations to be submitted for consideration of the house of delegates.

The work of the various sections and committees will be continued with the purpose of providing greater service to the individual members of the American Bar Association than has been possible hitherto.

The various suggested plans from which this proposed plan gradually has emerged will be found described in the report of the special Committee on Co-ordination of the Bar in the *Reports of the American Bar Association*, Vol. 6, for 1935 (pp. 556–573).

The plan represents an enormous amount of work by the committee, of which Mr. Jefferson P. Chandler of Los Angeles was chairman and also on the part of Mr. Ransom, the President of the American Bar Association, during the past year. It is a carefully planned experiment which seems a distinct step in advance for the American bar. As the movement began to take shape twenty years ago under the leadership of Mr. Root, as already pointed out, it seems fitting to quote the following letters from Mr. Root.

In a message read to the American Bar Association in August, 1933, he said:

> "The rapid changes in social forces and organization imperatively demand from the Bar of the United States an active exercise of its influence upon our laws and the administration and enforcement of law. For the performance of this duty there must be in the Bar new co-ordination of consideration, discussion, and seasoned opinion, and there must be means for impressing the conclusions thus reached upon all thoughtful citizens."

In April of this year he wrote again as follows:

> "April 14, 1936.
>
> "My dear Mr. Ransom:
>
> I have examined with interest and care the proposed Plan for bringing about a Representative and Improved Organization of the Legal Profession in the United States as revised by the Co-ordination Committees of the American Bar Association.
>
> "My opinion of the practical working of the details of the Plan would be of little value because I have had no opportunity to discuss them with lawyers in active practice.

As to the general character of the Plan and the importance of giving it effect, I have no doubt whatever. There have been some serious defects in the machinery of the American Bar Association which have limited and interfered with its power and influence. To remedy these defects it is plain that the direct co-operation of state and local bar associations with the national association is necessary. The proposed Plan aims to facilitate that co-operation and if it is adopted I think that action under it will not merely increase but will multiply many times the influence of the members of the American Bar in making the administration of justice in our country more effective.

Yours sincerely,

ELIHU ROOT.

Honorable William L. Ransom,
President of the American Bar Association,
New York City, New York."

We agree with Mr. Root and urge the Massachusetts members of the American Bar Association to give their support on August 24th.

FRANK W. GRINNELL.

RECENT LEGISLATIVE HISTORY IN REGARD TO RETIREMENT OF JUDGES.

1. The Vote of Members of the Executive Committee of the Massachusetts Bar Association of May 16, 1936.

(Sent to the press and to the Judiciary Committee of the Legislature).

Owing to the disturbing reports in the press of a contemplated examination of all judges who have reached the age of seventy years with a view to their compulsory retirement under the provisions of the fifty-eighth amendment to the Constitution, a meeting of the Executive Committee of the Massachusetts Bar Association was called to-day (May 16) to consider such action.

In the opinion of the eleven members of the Committee present the fifty-eighth amendment providing for the retirement of judges by the Governor with the consent of the Council applies only when a judge is *incapacitated* as a result of "advanced age or physical or mental disability" so that he cannot function. The amendment was described by the justices of the Supreme Judicial Court in volume 271 of the Massachusetts Reports at page 575 as one of two methods provided in the Constitution "to relieve the judicial service of judges no longer competent to render efficient service".

The members of the Committee also point out that the amendment does not authorize the Governor and Council to fix any specific retirement age for judges in general, as such a retirement age for compulsory retirement can only be fixed by a constitutional amendment.

The members of the Committee are glad to learn from the papers to-day that the original plan of the Governor as out-lined in the press has been abandoned.

The members of the Executive Committee present record their support of the general principle of allowances on *voluntary* retirement for judges. Many of our ablest judges have rendered great public service in their positions after they were 70 years old, both in Massachusetts and in the United States Courts as well as in other jurisdictions.

Henry R. Mayo, *President,*
Frank W. Grinnell, *Secretary.*

The members present at the meeting were: Henry R. Mayo, President of the Massachusetts Bar Association and also President of the Essex Bar Association; John M. Maloney, President of the Middlesex Bar Association; John B. Tracy, President, Bristol County Bar Association; Homer Albers, President, Norfolk Bar Association; Irving H. Gamwell, Secretary, Berkshire Bar Associa-

tion, representing that association by delegation of the president of that association; James A. Crotty, of Worcester; Sybil H. Holmes, of Brookline; Philip Rubenstein, of Boston; Romney Spring, of Boston; Harris H. Richmond, of Winchester, and the Secretary.

A STATEMENT BY MEMBERS OF THE EXECUTIVE COMMITTEE OF THE MASSACHUSETTS BAR ASSOCIATION OF THEIR UNDERSTANDING OF THE CONSTITUTIONAL PROVISIONS RELATING TO THE TENURE OF JUDGES AND THE HISTORY AND MEANING OF THOSE PROVISIONS.

(As Adopted at the Meeting of May 16, 1936.)

As there appears to be a common misunderstanding of the constitutional provisions relating to the judiciary, the Executive Committee of the Massachusetts Bar Association states its understanding of them as follows:

Following the interference by the King and his representatives with the independence of American Courts in the colonies prior to the revolution, referred to in the Declaration of Independence, the Massachusetts Constitution provided for three independent departments of government and by the twenty-ninth article of the Bill of Rights and the third chapter of the Frame of Government provided, as is also provided in the Constitution of the United States, that judicial officers "shall hold their offices during good behavior".

In an advisory opinion of the Justices of the Supreme Judicial Court, 271 Mass. 575, the justices advised the House of Representatives that "It is no imputation on good behavior to become seventy years old" and that "age and good behavior are unrelated subjects. There is no connection between the two."

In order to protect the people from violations of "good behavior", the original constitution also provided for removal in two ways by impeachment before the Senate, and "by the Governor with the consent of the Council upon the address of both houses of the legislature" (See Chapter 3).

By the fifty-eighth amendment adopted in 1918, it was further provided that, "the Governor with the consent of the Council may, after due notice and hearing, retire judicial officers because of advanced age or mental or physical disability". No particular age is specified in this amendment and so long as a judge is physically and mentally competent to do his work according to reasonable standards, the fifty-eighth amendment does not apply. As the justices have said in the opinion above referred to, age does not affect the tenure of office. The fifty-eighth amendment applies only when "advanced age" results in incapacity to perform the judicial work of the office.

Mr. Blackmur, of Quincy, who first introduced the amendment in the Convention of 1917–19, explained it (See *Debates*, Vol. I, 948–1028) as a method of retirement "if a judge becomes *incapacitated* by age, mental infirmities or physical infirmities," and that is its obvious meaning when read in connection with the dominant provision for tenure as explained by the justices.

The amendment did not authorize the Governor and Council to fix any arbitrary age for retirement. The Governor and Council acting independently after due notice and hearing must each find on reasonable grounds incapacity resulting from advanced age or physical or mental disability before they are authorized to retire a judge. Temporary illness, of course, is not a sufficient ground for retirement and each case must, of course, be considered separately, first by the Governor upon whom rests the primary responsibility (as explained by the Justices in the advisory opinion in 190 Mass. p. 616 at p. 620) and independently by the Council before they give their "consent", which is required.

In the case of the nomination and appointment of a judge, Chapter II, Sec. 1, Art. IX requires the nomination to be submitted by the Governor to the Council "at least seven days prior to such appointment". As stated by the Justices in their opinion (190 Mass. at p. 620), this "secures for the Council time to consider whether to give their advice and consent". While the fifty-eighth amendment does not specifically require a similar lapse of seven days between the action of the Governor and of the Council, yet the retirement of a judge is a matter of serious importance which calls for deliberate consideration by the Council as a separate body created by the constitution for the independent consideration of matters in which their "consent" is required.

The foregoing statement was adopted by the members present at a meeting of the Executive Committee of the Massachusetts Bar Association on May 16th, 1936.

HENRY R. MAYO, *President*,
FRANK W. GRINNELL, *Secretary*.

2. HOUSE, No. 1884.

THE GOVERNOR'S MESSAGE OF MAY 26, 1936.

Executive Department, Boston, May 26, 1936.

To the Honorable Senate and House of Representatives:

My last annual message to both branches of the Legislature stressed the necessity of "the enactment of legislation permitting a judge of any of the three courts of State-wide jurisdiction, upon reaching the age of seventy, to retire voluntarily at full salary from full active service". This recommendation was confined to the members of the Supreme Judicial Court, the Superior Court and the Land Court. While the time had arrived for the more equitable adjustment of the antiquated and obsolete provisions of

our retirement statutes, yet, as a practical matter, I believed that a substantial start could be more easily made if in the first instance only the three State-wide courts were included, and then upon the adoption of such legislation the act could be amended so as to extend to the regular members of each of our courts.

I am now convinced of the great public interest manifested by our citizens in the welfare of the judicial branch of our government, and, on account of the general friendly attitude expressed by them towards our judges, that the people are strongly in favor of the establishment of a genuine retirement system based upon the salaries paid to the incumbents of judicial offices at the time of their retirement, and comprehending the permanent and regular members of all of our respective courts. That view is shared by me.

I therefore recommend the passage of the accompanying bill providing for the payment of adequate retirement allowances to all of our regular judges.

JAMES M. CURLEY.

3. STATEMENT SUBMITTED TO THE LEGISLATURE ON MAY 1, 1936, BY THE CITIZENS' COMMITTEE ON THE PROTECTION OF THE JUDICIARY IN REGARD TO H. 1844.

We respectfully submit that a judicial retirement system requires more deliberate study than is possible in the closing days of a legislative session. Such a study should cover the following matters which do not appear to have been fully considered in the hasty drafting of H. 1844:

First—Our present statutes are the result of a change of legislative policy in 1920, following years of discussion as to contributory and non-contributory pensions in the entire state service.

Second—For about 35 years before 1920 we had a simple, fair system of judicial retirement on 3/4 pay at any time after reaching the age of 70 and after at least 10 years of service, but without compulsion, or legislative pressure of any kind. If the legislature desires to do so, that simple system can be restored, as suggested at the public hearing by Representative McDonald of Chelsea, a member of the Judiciary Committee, by reviving the earlier statutes which provided for retirements at comparatively little cost to the state. We should welcome such action. We oppose only the new, compulsory, unconstitutional and other features of H. 1844, which did not appear in our earlier statutes.

Third—H. 1844 presents a complicated system the practical effects of which appear only on close study. It should not be enacted because

A. Section 10 expressly assumes that parts of the bill may be unconstitutional. It seems most inadvisable for the legislature by hasty action to subject the judicial system of the people to legislation containing such admitted uncertainties.

B. H. 1844 as a whole is, in our opinion, unconstitutional.

1. Neither the executive nor the legislature can specify 70 years as the age for compulsory retirement of all judges, or as a presumptive age for examination by the executive with a view to action under the 58th amendment to the Constitution of Massachusetts. The great public services rendered by many Massachusetts judges after 70 have demonstrated that any such presumption would be mistaken in fact and unconstitutional, and the court has so declared. (See 271, Mass. 575).

2. What the legislature cannot do directly it cannot do indirectly by offering to purchase vacancies with the people's money, from competent judges of 70 years, by giving them a 60 day option of retirement on full pay, *with pressure to accept* by the alternative of receiving nothing on voluntary retirement after 60 days, or only half pay on involuntary retirement under the 58th amendment. (See appended quotations from two recent decisions of the United States Supreme Court.) Such a trading option would appear to be illegal legislative pressure on the independent coordinate judicial department of the government in violation of the 29th and 30th articles of the Bill of Rights. (See also the last two sentences of Art. XIII, Section 1, Chapter II, and Art. 1 of Chapter III of Part The Second of the Constitution of Massachusetts).

C. The 58th amendment provides that "retirement under it shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement." Under this sentence, if the legislature provides full pay for voluntary retirement, even if only for a 60 day option (as in H. 1844) the 58th amendment makes full pay obligatory for retirement under it, regardless of anything the legislature may say about half pay. The half pay provision is therefore unconstitutional if the full pay provision stands.

D. Section 60 C and Section 8, which apply to the chief justices of four courts provide for their retirement and the appointment of new "chief justices" who shall "outrank" them although they still remain members of their courts. The office of chief justice is an office distinct from the rest of a court, with special duties. As the court has said, a chief justice cannot be "demoted"—he "cannot retire voluntarily, or be retired by compulsion"—to the position of an associate judge." (See 271, Mass. 575.) These sections also purport to transfer the powers and duties of a chief justice, who is still a member of the court, to the new "chief justice" who shall

"outrank" him, whatever that means. The legislature has no more power to do that than it has to provide for a second governor who shall "outrank" and have all the powers and duties of the constitutional governor. The constitution does not allow any such proceeding.

E. Section 63 A and Section 8 provide that any judge who does not elect to retire on full pay in 60 days "may be retired under Article 58 'on half pay'." This would be a mistaken and unconstitutional statement of the 58th amendment which should not appear in any legislation. The 58th amendment provides for retirement only because of incapacity, and fixes the retirement allowance at the same rate as for voluntary retirement. The legislature cannot add to, or change, the amendment by specifying conditions, of retirement or providing any presumption about age, or provide less allowance for involuntary than for voluntary retirement.

F. For the reasons above specified we respectfully submit *that every substantial section of the proposed act is unconstitutional.* If the bill is enacted, judges now over seventy must retire within sixty days or lose their right of retirement under the terms of the bill. Should the act be later declared unconstitutional, judges who had thus retired would be in the uncertain position of possibly forfeiting their right to full pay and judges who might be appointed to the supposed vacancies would be in the position of not knowing whether they were judges or not, because of the uncertainty as to whether vacancies actually existed.

Fourth—There are other details of the bill which were evidently not thought out fully in its preparation, such as the possible increase in the judicial force by about twenty-five judges at an annual additional cost of about $175,391, and the fact that under the bill, as drawn, a judge might be appointed a week before reaching 70 and then retire on full pay after serving one week.

Fifth—Under the 18th article of the Bill of Rights "the people have a right to require of their lawgivers an exact and constant observance of the principles of the constitution". As citizens of Massachusetts we ask for a more deliberate study of this important subject than is possible at the close of a legislative session.

Respectfully submitted,

In behalf of the Citizens' Committee
on the Protection of the Judiciary

ELIOT WADSWORTH, *Chairman*
CARL P. DENNETT
A. LAWRENCE LOWELL
ALBERT N. MURRAY
GEORGE R. NUTTER
P. A. O'CONNELL
B. J. ROTHWELL
BENTLEY W. WARREN

Quotations from Recent Decisions of the United States Supreme Court

United States of America v. *Butler* (The A.A.A. Case decided January 6, 1936).

> "With regard to a regulation under which the farmers got a benefit if their crops were reduced, but otherwise got nothing at all, Mr. Justice Roberts said: "The government asserts that whatever might be said against the validity of the plan, if compulsory, it is constitutionally sound because the end is accomplished by voluntary co-operation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy."

Carter v. *Carter Coal Company* (The Guffey Coal Case, decided May 10, 1936).

> "With regard to a tax of 15%, which was to be substantially reduced if one joined in an agreement for marketing, the court said, "The whole purpose of the exaction is to coerce what is called an agreement, which of course it is not, for it lacks the essential elements of consent. One who does a thing in order to avoid a monetary penalty, does not agree; he yields to compulsion precisely the same as though he did so to avoid a term in jail."

SUBSEQUENT DEVELOPMENTS.

At the hearing before the Judiciary Committee, Mr. Nutter, while approving retirement allowances for voluntary retirement, suggested that the problem of working out some contributory system should be studied.

The Judiciary Committee reported against House 1844. In the House, Representative McDonald moved to substitute a bill which was substantially a revival of the retirement law as it existed before 1920, as explained in the "second" paragraph of the statement of the Citizens' Committee. The opposition in the House, as reported in the press, was led by Representative Hays as follows:

> "After Representative Paul J. McDonald of Chelsea presented the Governor's compromise measure, declaring that all members of the citizens' committee favored it, Representative Hays took the floor in opposition.

"Never before," he said, "have I observed a resentment as widespread and militant as was directed against the Governor's first proposal. The press and the bar were outraged. The hearings and arguments were sufficient to convince any open mind that the bill was unconstitutional. And now we are informed in the press that His Excellency favors legislation substantially, if not actually, in accordance with the substitute bill offered by the gentleman from Chelsea.

"That bill simplified means that the judges may voluntarily retire after the age of 70, after 10 years of service, with a pension of 75 per cent. That bill, in my opinion, is a constitutional act, and that bill, I want to admit, bad as I believe it is, is the best of the three propositions that have been submitted to us.

"I am going to attack it on just one issue and that is its cost. I'm not going to dwell at length on whether a man arrives at the height of his intellectual power at 70 because this bill does not force him out. But I am going to call your attention again to the dollar and cent angle.

"How many of these judges take this job at a sacrifice? How many of them had large practices which gave them a net earning in excess of what they received as justices?"

The argument continued along the line of opposition to noncontributory pensions which led to the change in the law in 1920. The bill was defeated by a vote of 169 to 34. Thereafter the following special message was sent in:

HOUSE, No. 1943.

THE GOVERNOR'S MESSAGE OF JUNE 19, 1936.

Executive Department, Boston, June 19, 1936.

To the Honorable Senate and House of Representatives:

There is a clearly definite policy on the part of the Commonwealth to recognize that those who serve faithfully and efficiently over a fixed period of years and reach the age of seventy should receive such retirement allowances as would provide some income in the declining years of life.

Industry has recognized the value of this program, and all forward-looking employers, who recognize their obligation to society as a whole, make provision for the retirement of their employees to the same end.

The broad question of retirement at the age of seventy from active part in the affairs of both industry and government is recognized as a problem that concerns the whole world. Legislation by Congress and the governments of many nations has made provisions

for the carrying out of this policy. The distinction between public and private employees in a question of this kind is so slight that approval or disapproval of this policy as it relates to either one or the other of the classes of employees or officers retards the effectiveness of the whole program. The relation is so close that it is difficult to distinguish.

I firmly believe that the question of determining a definite age at which such provision should become effective is difficult, because there are men and women who are so blessed mentally and physically that they retain their faculties and physical powers to a very ripe age. In dealing with questions of this kind, a general rule must be established. It is universally recognized that seventy years is the age which includes the general majority and excepts a small minority. This is recognized by every scientific approach and permits of but little contradiction. I cannot admit this should not apply in the matter of judges of our courts as well as to men in other walks of life. The present law makes no provision for proper retirement of judges of our courts. It is but natural that those men who at an advanced age cannot face the uncertainties of the future with the assurance of the things that are necessary to life should attempt with their remaining powers to perform the exacting duties of justices of our courts, and deal with complex and intricate problems, which, because of economic difficulties continue to increase their burdens. To the end that this Commonwealth shall place itself in line with other progressive states of the Union to recognize the worth of the retirement system, I recommend the following legislation:

JAMES M. CURLEY.

The accompanying bill was the same as the bill which had been offered by Mr. McDonald and defeated—a revival of the retirement law as it existed before 1920, as explained in the paragraph marked "second" in the statement of the Citizens' Committee printed above. The House voted to place the message and bill "on file".

As we go to press the matter stands there with the legislature still in session.

THE FEDERAL REGISTER.

The Special Committee on Administrative Law of the American Bar Association in its 1934 report recommended the enactment of Federal legislation providing for the centralization and publication of all Presidential proclamations and Executive orders and of the rules, regulations, licenses, codes, and other documents having general applicability and legal effect issued or prescribed by any of the Executive departments and other agencies of the Administrative branch of the Federal Government. The Special Committee found, as a result of its study, that because of the many bureaus, commissions, and agencies which were created with authority delegated by Congress to issue orders, rules, and regulations to enforce and carry out the purposes of Federal legislation, it had become almost an insuperable task for the private lawyer and other persons concerned to find these regulations in order to ascertain the legal effect of the statutes involved. Truly, as one writer has stated, it had become literally "government in ignorance of the law".[1] To remedy this situation, the Federal Register Act was proposed and enacted. It was approved by the President on July 26, 1935.[2] It provided for the custody of Federal proclamations, orders, regulations, notices, and other documents, and for the prompt and uniform printing and distribution thereof.

Under the act, a new Division created in The National Archives, receives the original and two duplicate originals or certified copies of all documents required or authorized to be published in the *Federal Register* and notes thereon the day and hour of filing. The act requires that one of the duplicate originals or certified copies be forwarded to the Government Printing Office for printing. Another shall be immediately made available for public inspection. In this connection, it is well to note that the act provides that no document required to be published in the *Federal Register* shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division of the Federal Register, The National Archives, and a copy made available for public inspection. During the period March 12 to June 18, approximately 700 documents have been filed with the Division, made available for public inspection, and printed in the daily issues of the *Federal Register*.

[1] Griswold, Government in Ignorance or the Law (1934), 48 Harv. L. Rev. 198.
[2] 49 Stat. 500 (1935) 44 U. S. C. 301, *et seq.*

The act is specific concerning the types of documents which are to be published, and provides that there shall be published in the *Federal Register* (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by act of the Congress. Through the operation of these provisions, it will be observed that the publication of numerous inter-departmental administrative rulings, which have no effect on the public generally and which are concerned only with matters of internal administration, is eliminated. The act specifically prohibits the publishing of comments or news items of any character whatsoever.

Publication of the daily issue of the *Federal Register* began on March 14, 1936. This publication aims to fill the long felt need for an official publication to which all interested persons may refer for the official texts of current Federal documents with which they or their clients might be required to comply. The form, style, and size of the publication is similar to the *Congressional Record*. Of the contents of the *Federal Register*, however, the courts are required by the act to take judicial notice.

All documents still in force and effect and relied upon by a Federal agency as authority for, or used by it in the discharge of its functions, which were issued prior to March 12, 1936, are required to be compiled and published in supplemental editions.

Under the Regulations prescribed by the Administrative Committee of the *Federal Register* and approved by the President on March 11, 1936, the daily issues are required to be distributed Tuesdays through Saturdays. The Administrative Committee has also prescribed the subscription prices for this publication which will be mailed to subscribers free of postage for $1 per month or $10 per year; single copies five cents; payable in advance. Subscription prices include indexes. Remittances should be made by check or money order, payable to the Superintendent of Documents, Government Printing Office, Washington, D. C.

JOHN J. BRAUNER,
Editor Federal Register.

THE DISTRICT COURTS OF MASSACHUSETTS.

Speaking extemporaneously at the recent Annual Dinner of the Essex Bar Association at the Hotel Hawthorne at Salem, Mr. Justice Lummus of the Supreme Judicial Court said in part:

Most of the troubles that we find in our district court system are the results of its origin. The Commonwealth was never divided scientifically into districts. District courts were created without system, to take the places of the old justices of the peace and trial justices. Some of the latter still exist. Tiny courts were created and are still maintained merely to gratify local pride. None of the district judges, except possibly in some of the largest courts, are paid salaries upon which they can be expected to live without other work. A multitude of special justices bear the judicial title without really living the judicial life. A few may be tempted to exploit the title for advertising purposes. The whole system operates on a part time basis. That basis, with the increase in importance of these courts, has become unsound.

One evil result is that governors, acting in the mistaken belief that the office of special justice, if not that of justice, has little importance, have too often nominated inferior men in these courts. Governors have not realized that a majority of our people judge the judiciary as a whole by their local judges whom they see at close range. To the public in general, a judge is a judge, regardless of duties or rank. I find that most of those who speak to me about my work think that I spend my days imposing criminal sentences.

Another evil result of a system of part time judges is the doubt of judicial impartiality that arises when a judge has to conduct an active general practice of law in the same community, especially when he deals with the same liability insurance companies that often defend cases in his court.

We can find many faults with our district court system. Yet a great majority of the justices, and many of the special justices, are intelligent, conscientious, competent men. Some are judges of distinction. Do not let any one tell you, as some have tried to tell me, that our system of lower courts is the worst in the country. On the contrary, a pretty careful study convinces me that it is incomparably the best. The bar and the people of Massachusetts are not satisfied with a brand of justice in the district courts markedly inferior to that administered in the higher courts. Our very dissatisfaction with the imperfections of our district court system is evidence of the comparatively high standard which our district courts have attained. In most other states, the courts of like rank are usually parts of the local political machine, and in them impartial justice is seldom expected.

THE LAW AS TO SO-CALLED TAX "EVASION".

In *Bullen* v. *Wisconsin*, 240 U. S. 625 at pp. 630–31, Mr. Justice Holmes said:

> "We do not speak of evasion because when the law draws a line, a case is on one side of it or the other, and if on the safe side, is none the worse legally that a party has availed himself to the full of what the law permits," (*cf.* L. R. 1909, A. C. 466).

Along the same line, the following recent opinions are interesting.

(Extracts from Opinions of the House of Lords in Inland Revenue Commissioners v. *The Duke of Westminster, L. R. 1936-A. C. 1.)*

LORD ATKIN.

"It was not, I think, denied—at any rate it is incontrovertible—that the deeds were brought into existence as a device by which the respondent might avoid some of the burden of surtax. I do not use the word device in any sinister sense, for it has to be recognized that the subject, whether poor and humble or wealthy and noble, has the legal right so to dispose of his capital and income as to attract upon himself the least amount of tax. The only function of a court of law is to determine the legal result of his dispositions so far as they affect tax."

LORD TOMLIN.

"Apart, however, from the question of contract with which I have dealt, it is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called "the substance of the matter." . . . This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting "the uncertain and crooked cord of discretion" for "the golden and streight metwand of the law."[1] Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be

[1] 4 Inst. 41.

of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.

"The principal passages relied upon are from opinions of Lord Herschell and Lord Halsbury in your Lordships' House. Lord Herschell L. C. in *Helby* v. *Matthews*[1] observed: "It is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree;" but he went on to explain that the substance must be ascertained by a consideration of the rights and obligations of the parties to be derived from a consideration of the whole of the agreement. In short Lord Herschell was saying that the substance of a transaction embodied in a written instrument is to be found by construing the document as a whole.

"Support has also been sought by the appellants from the language of Lord Halsbury L. C. in *Secretary of State in Council of India* v. *Scoble*.[2] There Lord Halsbury said: "Still, looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words), this is not the case of a purchase of an annuity." Here again Lord Halsbury is only giving utterance to the indisputable rule that the surrounding circumstances must be regarded in construing a document.

"Neither of these passages in my opinion affords the appellants any support or has any application to the present case. The matter was put accurately by my noble and learned friend, Lord Warrington of Clyffe, when as Warrington L. J., in *In re Hinckes, Dashwood* v. *Hinckes*[3] he used these words: "It is said we must go behind the form and look at the substance . . . but, in order to ascertain the substance, I must look at the legal effect of the bargain which the parties have entered into." So here the substance is that which results from the legal rights and obligations of the parties ascertained upon ordinary legal principles, and, having regard to what I have already said, the conclusion must be that each annuitant is entitled to an annuity which as between himself and the payer is liable to deduction of income tax by the payer and which the payer is entitled to treat as a deduction from his total income for surtax purposes."

[1] (1805) A. C. 471, 475.
[2] (1903) A. C. 299, 302.
[3] (1921) 1 Ch. 475, 489.

LORD RUSSELL OF KILLOWEN.

"I confess that I view with disfavor the doctrine that in taxation cases the subject is to be taxed if, in accordance with a court's view of what it considers the substance of the transaction, the court thinks that the case falls within the contemplation of spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case. As Lord Cairns said many years ago in *Partington* v. *Attorney General*[1]: "As I understand the principle of all fiscal legislation it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be." If all that is meant by the doctrine is that having once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good. That is what this House did in the case of *Secretary of State in Council of India* v. *Scoble*[2]; that and no more. If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilities of the parties being different from what in law they are, then I entirely dissent from such a doctrine."

LORD WRIGHT.

"And once it is admitted that the deed is a genuine document, there is in my opinion no room for the phrase "in substance." Or, more correctly, the true nature of the legal obligation and nothing else is "the substance". I need not develop this point, as I agree with what has been said by my noble and learned friends, Lord Tomlin and Lord Russell of Killowen."

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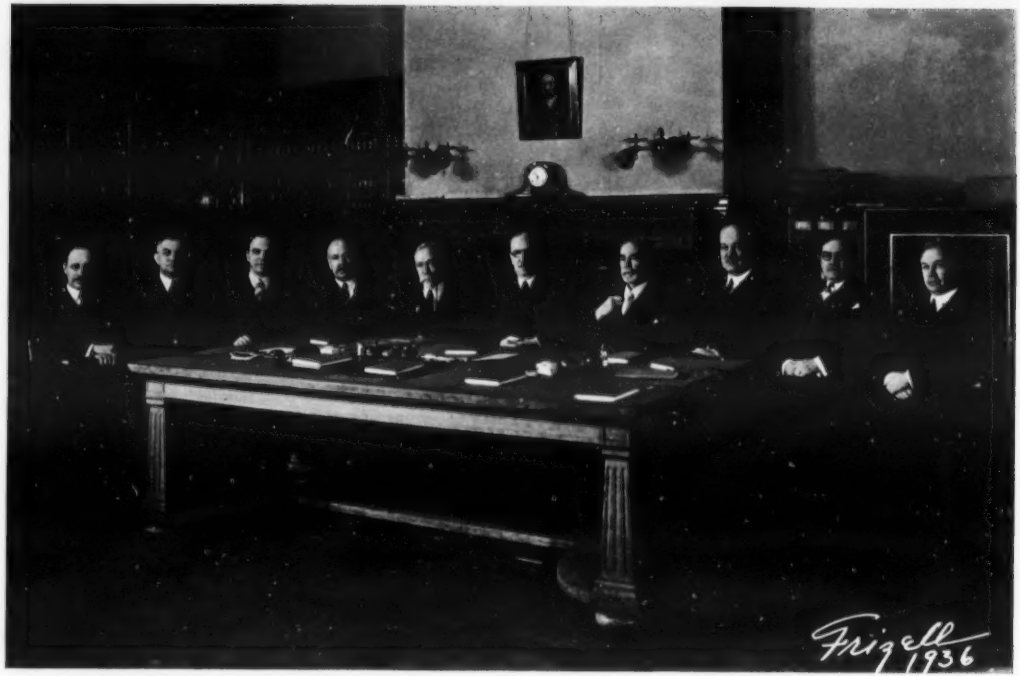
[1] (1869) L. R. 4 H. L. 100, 122.
[2] (1903) A. C. 299.



JOHN A. DALY CHIEF JUSTICE BOLSTER T. HOVEY GAGE, Chairman JUDGE HIBBARD JUDGE DOLAN

F. W. GRINNELL, Secretary HERBERT B. EHRMANN JUDGE LAWTON JUDGE DAVIS FRANCIS R. MULLIN

THE JUDICIAL COUNCIL OF MASSACHUSETTS
APRIL, 1936

MATTERS PENDING BEFORE THE JUDICIAL COUNCIL.

For the information of the bar and as a basis for requests for suggestions, the following list of subjects pending before the Judicial Council for consideration is submitted.

(1) On request from the legislature for report:

1. The drafting of a short form of tax-title deed—requested by resolve.

2. A bill to provide for third-party procedure based on Admiralty Rule 56—requested by resolve chapter. Compare Rule 19 and notes in tentative draft rules for the Federal Court recently submitted by the Advisory Committee, and circulated to all members of the American Bar Association.

3. House 1249 relative to the determination of probate accounts—requested by joint order. This bill was printed and explained in the MASSACHUSETTS LAW QUARTERLY for April, 1936, page 15, and supplemented by a discussion of the law on pages 16–24.

4. House 65, the so-called Uniform Extradition Act—requested by joint order. This act was reported on by the Judicial Council in its sixth report for November, 1930. It has since been somewhat revised and the Council is requested to reconsider it.

(2) Other matters under discussion:

1. The entire report of the special Commission on Judicial System relative to district courts, rule-making power, etc. This report was reprinted in full in the special number of the MASSACHUSETTS LAW QUARTERLY for May, 1936.

2. By St. 1936, Chap. 31, it was provided that the statistical returns of the business of the Superior Court from the clerks of court in the various counties should be made to the Judicial Council, instead of to the Secretary of the Commonwealth, in such form as the Judicial Council should determine. The returns hitherto have been published in the appendix to the annual Report of the Judicial Council. The Council is considering the revision of the form of statistical table with a view to presenting a better picture for practical study of the work of the courts with a minimum of work for the clerks in preparing the return.

3. The simplification of procedure and practice in regard to set-off, counterclaim, etc.

4. The improvement of procedure in regard to the law as to accessories after the fact under G. L. Chap. 204, Sec. 4, where the defence is consanguinity, affinity or adoption.

5. A proposal to extend the procedure for declaratory judgments, now limited in Massachusetts to the interpretation of written instruments. The latest information on this subject appears in Professor Borchard's article on, "Recent Developments in Declaratory Relief", in the *Temple Law Quarterly* for May, 1936, and, in abbreviated form, also in *Current Legal Thought* for June, 1936 (pp. 846–850).

6. Limited appeal by the government in criminal cases (See Annotated Model Code of Criminal Procedure of the American Law Institute, Sec. 428, and commentary on p. 1203) cf. the special pamphlet of the American Law Institute containing a proposed statute on double jeopardy with a full annotation.

7. Appraisals—a suggestion for legislation that only one appraiser of estates should be appointed unless the court specially orders more than one.

The question of renewing various recommendations in the eleventh and previous Reports of the Judicial Council, which were not adopted this year.

In addition to these specified matters, the judicial system as a whole always is under consideration, as indicated in the discussion of the "pros and cons" of the unified court idea in the eleventh report (see MASSACHUSETTS LAW QUARTERLY for January, 1936, pp. 8–16). Suggestions in regard to any matters, whether specified or not, will be welcomed and should be sent to the address below.

FRANK W. GRINNELL, *Secretary,*
Judicial Council,
60 State Street, Boston.

A VOICE FROM THE RISING GENERATION.

In view of the current vociferous charges that Bolshevistic radicalism is rampant among college students, the following extracts from the recent Harvard Class Day oration of A. Gilman Sullivan, of Caribou, Maine, are interesting. One young college student has learned that as the capacity for "renunciation" is the foundation of the Christian virtues of the individual, so the capacity for collective self-restraint is the foundation of popular government. That was the idea which the founders of Massachusetts and of the American Nation contributed to the science of government through the state and federal constitutions. It is the idea, in the words of this young class day orator, of "humble government". The whole address, which was printed in the *Boston Evening Globe* of June 17th, is well worth reading by old and young. It shows that young men still know how to think in this country with their eyes on the stars, but with their feet on the ground.

F. W. G.

EXTRACTS FROM THE CLASS ORATION.

"God knows all is not right with the world. And it is but natural that men should seek to improve their state. But by this time we should have guessed that there are no panaceas. And cure-alls are sold by quacks and bought by fools.

"There has been one price consistently asked—the surrender of a portion of freedom, the size of the portion varying with the alleged potency of the nostrum. We must face the fact squarely. We live in a time not of expanding, but of narrowing freedom. If we are to preserve the precious heritage of freedom unslackened and bequeath it to our sons, we shall have to fight for it. . . .

"Liberalism is the philosophy of change and is good only when the change is good. . . .

"The threat to freedom to-day is not the threat to special privilege against which the favored few may cry out. It is the real and horrible threat to the right of the people to free choice and free action, to the expression and the fulfillment of their will. . . .

"We know that when a people has grown careless of its right to the expression and fulfillment of its will, political opportunists are never lacking to substitute their will for that of the people, and to deny to it the right to one of its own. . . .

"The lover of freedom will . . . be unwilling to grind axes for other people, and as a consequence will be skeptical of the reformer. Reform he will not resist if he honestly believes it to be good. But he will never shirk the duty of reasonable criticism, knowing that it is by that means truth is tested and purified and quackery revealed.

"Against the prejudice of the standpatter he will fight with ordered reason as he will against the emotion of the liberal for liberalism's sake. He will demand humble government aware of its duty to the people."

Entertainment Program for Commissioners on Uniform State Laws and for American Bar Association.

Plans for the entertainment of members of the American Bar Association and their wives, attending the fifty-ninth annual meeting of the Association in Boston during the week beginning Sunday, August 23, and also for the Commissioners on Uniform State Laws and their wives, during the preceding week, are well advanced. All the chairmen of the Boston and New England Committees are now meeting weekly.

The Bar Association of the City of Boston has general supervision of the arrangements and raising of funds required to cover the entertainment program. Bentley W. Warren, President of the Boston association, is Honorary Chairman and Jay R. Benton is General Chairman of the Boston Committee, which has the local arrangements for the convention in charge. The Finance Committee is headed by Willard B. Luther, who is assisted by Harvey H. Bundy, Francis J. Carney, Jacob J. Kaplan, Charles Stetson, Oliver Wolcott and John S. Whipple, Secretary. As this is a convention in which all New England is interested, practically all of the leading bar associations are cooperating and have appointed members of their associations to serve on the several committees. Edward M. Dangel and John G. Brackett are in charge of the coordination of the bar associations and the following have already made committee appointments:

Connecticut State Bar Association
Maine State Bar Association
Massachusetts Bar Association
New Hampshire State Bar Association
Rhode Island State Bar Association
Vermont State Bar Association

Barnstable County Bar Association
Boston University Law School Association
Bristol County Bar Association
Cambridge Bar Association
Fall River Bar Association
Franklin County Bar Association
Hampden County Bar Association
Hampshire County Bar Association
Lawrence Bar Association
Law Society of Massachusetts
Lowell Bar Association
Newport, Rhode Island, Bar Association

Norfolk Bar Association
Peabody Bar Association
Quincy Bar Association
Salem Bar Association
Somerville Bar Association
Suffolk Law School Alumni Association
Taunton Bar Association
Women Lawyers' Association of Massachusetts
Worcester County Bar Association
Younger Members of the Bar

For the purpose of affording our guests every opportunity to visit historic places, a committee has been organized in charge of Col. Frederick G. Bauer, to provide sightseeing trips throughout the two weeks; local sightseeing headquarters will be set up in many of the places to be visited with the members of the local bar association in attendance. Opportunity will be afforded our guests to visit the North Shore, with its historic towns of Salem and Marblehead, the South Shore, including the cities of Quincy, Plymouth and Marshfield (home of Daniel Webster). Lexington and Concord will be visited and the many historic places in Boston itself, such as the Old State House, Faneuil Hall and the Old South Meeting House.

A special committee, headed by Judge F. Delano Putnam, is making arrangements so that our guests may see the professional baseball games. The Boston Bees at that time will be playing Philadelphia and the Giants; the Red Sox will play Detroit and St. Louis.

All of the leading golf clubs in the metropolitan district of Boston will be open to our guests and on one of the days a special golf tournament will be held. The golf arrangements will be under the supervision of the Bench and Bar Golfing Society, of which Judge Wilford D. Gray is Honorary Chairman and James E. O'Connell, President.

The entertainment program for the two weeks as now set up is as follows:

Program for Commissioners on Uniform State Laws:

Tuesday, August 18—Reception for the wives of the Commissioners on Uniform State Laws, at the Hotel Statler.
Professional baseball game—Boston Bees against Philadelphia.

Wednesday, August 19—Reception and tea for the wives of the Commissioners at the Hotel Statler.
Professional baseball game—Bees against Philadelphia.

Thursday, August 20—The Ladies' Harvard Luncheon Committee will arrange for a luncheon to be given at Cambridge. An opportunity will be given to visit the principal points of interest at Cambridge and Harvard University.

Professional baseball game—Bees against Philadelphia.

Friday, August 21—The Ladies' Marblehead Luncheon Committee will arrange for luncheon to be held at one of the yacht clubs at Marblehead Neck.

Professional baseball game—Bees against New York Giants.

Saturday, August 22—At noon, the Commissioners and their wives will be entertained at luncheon at the Harvard Law School. Dean Roscoe Pound will be in charge of the arrangements.

In the afternoon, professional baseball game—Bees against the New York Giants.

In the evening, there will be a dinner and cabaret show for the Commissioners and their wives—probably at the Roof Garden of the Ritz-Carlton Hotel.

Sunday, August 23—An all-day trip for the Commissioners and their wives to Plymouth. Dinner.

Program for American Bar Association.

Friday, August 21—In the evening, a dinner will be given in honor of the president, officers and executive committee, of the American Bar Association, in charge of Robert E. Goodwin, at the Harvard Club.

Sunday, August 23—Professional baseball game—Bees against the New York Giants.

In the evening, there will be a social gathering of the Junior Bar Conference at the University Club.

Monday, August 24—General reception for the wives of members at the Hotel Statler.

Tuesday, August 25—In the morning, there will be an assembly at the Old State House in Boston with an address by a leading jurist.

Sightseeing trips throughout the day.

In the afternoon, the ladies will be served tea on the new cruiser, "New Orleans," at the Charlestown Navy Yard.

There will be a program on the Frigate "Constitution" and exercises at Bunker Hill Monument.

Professional baseball game—Boston Red Sox and Detroit Tigers.

In the evening the Junior Bar Conference plan to hold a dance—combined with a moon-light cruise out of Boston Harbor.

Wednesday, August 26—In the morning, there will be an historic assembly at Faneuil Hall, with an address by Francis J. Hogan, of Washington, D.C.

At noon, there will be a luncheon in honor of the president, officers and executive committee of the American Bar Association, in charge of Daniel J. Lyne, at the Algonquin Club.

Professional baseball game—Red Sox and Detroit Tigers.

The Ladies' Entertainment Committee plan a trip to the North Shore and a clam-bake.

In the afternoon, historic exercises will be held at Fort Independence on Castle Island—this is the oldest continuously fortified spot in the United States.

Thursday, August 27—In the morning, there will be an historic assembly at the Old South Church with an address by a leader of the bar.

During the day, there will be a deep-sea-fishing trip, outside Boston Light, combined with a cruise about Boston Harbor, in charge of William T. A. Fitzgerald, Register of Deeds.

Also, on this day, the big golf tournament is to be held, under the direction of the Bench and Bar Golfing Society.

In the afternoon—professional baseball game, Boston Red Sox vs. Detroit Tigers.

The Ladies' Entertainment Committee has arranged for a luncheon and fashion show, to be held at one of the country clubs near Boston.

Friday, August 28—The Ladies' Entertainment Committee has arranged for a trip to Wayside Inn, Concord, Lexington. Luncheon.

Professional baseball game between the Red Sox and St. Louis.

In the evening, at the Hotel Statler, there will be a combination pop-concert, cabaret show and dancing. William M. Blatt is Chairman of this Committee.

Saturday, August 29—On this day, there will be an All Day Massachusetts Bay Salt Water Cruise, in charge of J. Weston Allen and Paul J. Foster of the Chamber of Commerce. It is planned to visit either Provincetown or Plymouth. During the cruise, there will be fire boat drills staged by the City of Boston, a coast guard exhibit at Point Allerton and manoeuvers by a Government submarine, detailed from New London to Boston. These various exhibits will be explained to the guests aboard the cruise-ship by means of a loud-speaker-system.

* * * *

Another interesting event will be the launching of a United States vessel in the presence of our guests at the Fore River shipyard upon a day to be determined.

The ladies' committee work has been under the direction of John C. Jones, Jr., assisted by Miss Mabel Bratton who, for several years, has been in charge of the twenty-fifth re-unions at Harvard and who has won for herself an enviable reputation for convention administrative work.

The ladies of Boston are looking forward with a great deal of pleasure to meeting and entertaining ladies who plan to attend the meetings of The Commissioners on Uniform State Laws and The American Bar Association. To this end, there has been organized a large ladies' Hospitality Committee, whose sub-committees are planning the various activities for the visitors.

The library at the Hotel Statler will be used as the ladies' assembly room. It will be open at all times and tea will be served every afternoon. It is in this room that the Boston hostesses will first meet the visiting ladies and help them make their plans for their stay in the city. It is hoped that the assembly room will be freely used by everyone.

The members of the Executive Committeee of the Ladies' Hospitality Committee of the Boston Bar Association are as follows:

Mrs. LaRue Brown, Chairman Sightseeing Committee
Mrs. David S. Burr, Chairman Committee of Hostesses, Commissioners of Uniform State Laws
Mrs. Edward B. Caiger, Chairman Concord Committee

Mrs. A. Barr Comstock, Chairman Fashion Show Committee
Mrs. Robert G. Dodge, Chairman Committee of Hostesses, American Bar Association.
Mrs. Richard C. Evarts, Chairman Harvard Luncheon Committee
Miss Sybil H. Holmes, Chairman Reception Committee
Mrs. James M. Hunnewell, Chairman Marblehead Luncheon Committee
Mrs. Charles H. Innes, Chairman Entertainment Committee
Mrs. Alexander Wheeler, Chairman North Shore Clam Bake Committee
Mrs. Lothrop Withington, Chairman Plymouth Trip Committee
Mrs. Stewart C. Woodworth, Chairman Flower Committee

Langdell Hall at Harvard Law School will be open during each day of the meetings and provision will be made for conducting visitors about. There will be an exhibition of rare books and manuscripts and articles from the legal museum. The library has the largest existing collection of English law books printed before 1600, and complete collections of the legislation, judicial decisions and treatises of every country in the world. Visitors will be specially interested in the Chancellor's Purse, formerly belonging to Lord Halsbury.

Especially noteworthy is the collection of oil portraits of English judges and lawyers (about 100) ranging in time from the reign of Henry VIII to the present, and including portraits by Sir Joshua Reynolds, Raeburn, Sir Thomas Lawrence, Romney, Sir Peter Lely, Van Somer and Kneller; of colonial judges, including portraits by Smibert and Feke; of the judges of the Supreme Court of the United States from the beginning to the present, including portraits by Gilbert Stuart, Sharpless, Leutze, and Chester Harding; of American state judges and lawyers, including the work of Trumbull, Jarvis, Pine, Vanderlyn, and Eastman Johnson; and of former teachers in the School, including portraits by Vinton, Gaugengigl, Lockwood, Tarbell, and Hopkinson.

Notable also are a statue of Joseph Story by his son, William Wetmore Story, and busts of Coke, Lord Eldon, Mr. Justice Holmes, and Mr. Justice Cardozo. There is a very large collection of prints and photographs of judges and lawyers, American, British, and Canadian, and a large collection of cartoons of judges and lawyers.

REPORT

OF THE

COMMITTEE ON RULE-MAKING POWER AND JUDICIAL COUNCILS.

To the Conference of Bar Association Delegates:

If the plan for reorganization of the American Bar Association is adopted, as presumably it will be at the annual meeting in August, the Conference of Bar Association Delegates, and, with it, this committee, will go out of existence. It seems appropriate, therefore, that this last report of the committee should review briefly the origin of the committee and render an account of its activities for convenient future reference.

At the Denver meeting of the Conference in July, 1926, Dean Pound delivered an address on, "The Rule-making Power of the Courts," in which he gave the history of the subject both in England and in this country, which address is now reprinted as an appendix to this report. (See p. 6.) This, together with the earlier work of years by the late Thomas W. Shelton, of Virginia, on the rule-making power of the Federal courts, formed the background of the work of this committee. At the same meeting of the Conference, Robert G. Dodge, Esq., of Boston, spoke on the subject of judicial councils. The conference then authorized the creation of a Committee on Rule-making and a Committee on Judicial Councils, which were later consolidated into one committee, with the late Josiah Marvel, of Delaware, as chairman. The report of this Denver meeting appears in the AMERICAN BAR ASSOCIATION JOURNAL for September, 1926, (pp. 657-659).

While Mr. Marvel was chairman during the next few years, the committee devoted its attention to assembling information on the two subjects mentioned in the title of the committee for the convenient use of members of the Conference in stimulating the study of these subjects in the different states.

The first report was printed as Part II of the AMERICAN BAR ASSOCIATION JOURNAL for March, 1927, and consisted of a discussion of the subject of rule-making, etc., by each of the eight members of the committee, separately. The report thus printed was supplemented at the meeting of the Conference in 1927 by a pamphlet, compiled under the supervision of Mr. Marvel, containing the constitutional and statutory provisions in all of the various states. This report was printed at Mr. Marvel's expense and was distributed at the conference.

The report of the committee in 1928 was made by Mr. Marvel and will be found in the AMERICAN BAR ASSOCIATION JOURNAL for November, 1928 (p. 621). It gives a brief account of the activity in various states which resulted from Mr. Marvel's stimulating enthusiasm and energy.

This was followed in 1929 by a report printed in separate pamphlet form devoted principally to the subject of judicial councils and containing an appendix with a description of the various councils then created and a bibliography of the subject.

The 1930 report, also in pamphlet form, covered developments in the various states, with a similar appendix and bibliography.

After Mr. Marvel's death, in order to supplement effectively his work and that of Mr. Shelton, the work of this committee took a new turn. In view of the gradual development of the work of the National Conference of Senior Circuit Judges, which was established at the suggestion of Chief Justice Taft about 1920, the chairman, on behalf of your committee, had a conference with Chief Justice Hughes in 1931 and explained briefly to the Chief Justice the possibilities of drawing out more effectively the professional interest and suggestions of members of the bar, throughout the country, for the assistance of the courts and of the annual conference of circuit judges. The Chief Justice listened with interest and with an admirably noncommital judicial attitude. In his address before the American Law Institute on the following morning, however, after referring to the work of the Conference of Circuit Judges, he said,

> "I trust that it may be possible to secure the general co-operation of the bench and bar in a manner perhaps similar to that which was successfully followed when the revised Federal equity rules were adopted."

With this sentence as a background, your committee, in its report to the conference in that year, emphasized the importance in the development of the judicial system of a representation of "the point of view of the men who represent the clients of the nation," and pointed out that, "The idea of the judicial council movement is that when representative members of the different branches of the judicial system from both sides of the bench sit down in a reasonably small conference, with a sense of definite professional responsibility and talk things over, they all learn something."

Your committee then outlined a plan for the creation of committees in the various Federal Districts or Circuits to be selected by the circuit or district judges to co-operate with the judges in the continuous study of the Federal judicial system. The desire for the co-operation of the bar expressed by Chief Justice

Hughes was reaffirmed by the Conference of Senior Circuit Judges in the fall of that year and the reports of your committee for 1932 and 1933 were primarily devoted to the encouragement of the organization of these Federal Bar Committees and conferences, with news as to their activities. This part of the work of the Conference of Bar Delegates appears to have been a contributing factor to the result that, when, in 1934, Congress finally passed the act authorizing the Supreme Court of the United States to prescribe general rules for the Federal Courts (an act for which Mr. Shelton had worked for so many years before his death), the Federal bench and bar were ready to co-operate in the work of preparation of the new rules.

At the American Law Institute on May sixth of this year, Chief Justice Hughes said:

> "At your meeting last May, I had the privilege of announcing that the court had decided to proceed with the preparation of a unified system of rules for cases in equity and actions at law in the district courts of the United States and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases.
>
> "It was recognized that while the court must itself assume the responsibility of preparing the rules, the court should be suitably aided in that undertaking.
>
> "For that purpose, the court at the close of the last term appointed an advisory committee.
>
> "As a result of labor of many months, the committee is about to submit to the bench and bar of the country a preliminary draft of rules as a basis for suggestion and criticism."

In their 1935 report, your committee made certain general suggestions in regard to the rules, emphasized the desirability of submitting tentative drafts to the co-operating committees in the circuits and districts, and included also the following suggestion, which is renewed by the present committee:

> "One of the advantages of our dual system of government has been the existence of separate state laboratories in which experiments in effectiveness and convenience under changing conditions may be tried out. In order that the new experiments in federal rule-making may be carried on with business-like possibilities of change, when, as and if, needed by the requirements of the work to be done, we suggest that after the rules have been formulated and promulgated some provision should be made for a standing advisory committee at large and for a similar standing circuit committee on rules so that the federal system of practice and procedure may be the subject of continuous study when occasion arises, and that it should not be assumed that the work is finally accomplished when the rules have been adopted."

As this report goes to press, the draft of the Federal rules has been circulated, prefaced by an interesting "Foreword" by

the committee and a letter from the Chief Justice, inviting suggestions from the co-operating committees and from the bar.

An article by Dean Clark (the reporter for the Advisory Committee) on, "Power of the Supreme Court to Make Rules of Appellate Procedure," has appeared in the June number of the HARVARD LAW REVIEW.

On page 170 of the Draft Rules appears "Rule A" providing for a standing committee on rules such as is suggested above, to be appointed by the court as an advisory committee to recommend changes from time to time suggested by experience. In the "Foreword" on page XXIII, the committee states that this Rule A "is presented merely as a recommendation to the court . . . to aid the court . . . in receiving recommendations for changes and keeping the system abreast of the times and curing deficiencies in rules."

We think the adoption of this recommendation by the court will add much to the confidence of the bar in rule making.

Dean Clark's article, above referred to, deals exhaustively with the extent to which the rule-making act covers rules relative to appeals, and the committee refers to the matter in its "Foreword" on page XI in connection with proposed Rules 50, 57, 68, 70 and 72. The act provides that the court "shall have the power to prescribe . . . rules for the district courts of the United States as to practice and procedure in civil actions." This committee expressed the opinion in its 1935 report that appellate procedure seems clearly included as "the federal system contemplates an appeal as part of the structural arrangement of a court of first instance."

The American Bar Association at the Boston meeting will devote Wednesday, August 26th, to a discussion of the subject, under the auspices of the Judicial Section and the National Conference of Judicial Councils, and the Committee on Jurisprudence and Law Reform. Any individual may send in suggestions by mail to Major Tolman or to any member of the standing committee, or co-operating committees, before September 1st.

There is one point which we wish to emphasize in connection with future discussions of the rule-making power. In our fourth report, we referred to the fact that this power is often referred to in discussions and in judicial opinions as an "inherent" power, and all readers of the AMERICAN BAR ASSOCIATION JOURNAL are familiar with the criticism of the idea that any courts have "inherent or God-given" powers. We agree that the powers must be "derivative" and that there is no such thing as "God-given" power in any court. It would be unfortunate if

the discussion of rule-making were confused by a misunderstanding of the word "inherent" as used by the courts. We do not understand that the courts use the word in any absurd sense. As this committee stated in its report in 1933, we understand the administrative power of the courts which is involved in the power to make rules, or, rather, the derivative duty (because the word "power" is always distracting) to be "inherent" in the sense of being "incidental to the duties, as a matter of common sense administration of the judicial business of the state, and that the reasonable regulation of how the business of courts is to be done is as natural a part of the judicial function, with the co-operation of the bar, as the actual decision of cases."

The division of labor between the three departments of government, which was provided for in American Constitutions, makes it necessary from time to time to define the boundaries, or the overlapping margin, between the judicial, legislative and executive functions in ascertaining the derivative duties and incidental powers. We believe that it is the considered weight of authority, with history at its back, that rule-making is a part of the judicial function, and that this view coincides with the popular belief that the courts, rather than the legislature, are responsible for the administration of justice.*

As to the judicial council movement, there are now approximately twenty judicial councils in different states, of which one of the latest,—that in New York—recently issued its second report in April of this year as "Legislative Document (1936) No. 48." The report shows a great deal of careful work. As pointed out in the last report of this committee, the National Conference of Judicial Councils, of which Arthur Vanderbilt, Esq., of New Jersey is the chairman, while still in a formative stage, probably will develop gradually into a convenient clearing house of information in regard to work of judicial councils throughout the country.

As the existence of this committee began with the address of Dean Pound, in 1926, we believe that its existence may come to an end most appropriately by again calling the attention of the profession on both sides of the bench to that illuminating

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* "In these days when every variety of bureau or department is being created in this country with almost unlimited power of regulation, it would be strange if a closer study of the nature of the great Judicial Department of our system of government did not result in recognition of regulatory powers adequate to the proper performance of the great duties imposed upon it—duties which the American people expect the courts and not the legislature to perform." (*See report of this committee for 1933.*)

address on the history of this subject. We think that all those who read that address, either for the first or second time, will have the same experience which we, ourselves, have had in preparing this report,—they will learn something. Accordingly, we reprint the address as an appendix to this report.

FRANK W. GRINNELL, *Chairman*, Boston, Mass.
FRANK E. ATWOOD, Jefferson City, Mo.
PALMER HUTCHESON, Houston, Texas
MURRAY SEASONGOOD, Cincinnati, Ohio
THOMAS PENNEY, JR., Buffalo, N. Y.
DAVID S. ATKINSON, Savannah, Ga.
ALVA M. LUMPKIN, Columbia, S. C.
VANBUREN PERRY, Aberdeen, S. Dakota
B. H. KIZER, Spokane, Washington
BARNETT E. MARKS, Phoenix, Arizona

APPENDIX

THE RULE-MAKING POWER OF THE COURTS*

* Address delivered before Conference of Bar Association Delegates at meeting of that section at the recent annual meeting of the American Bar Association at Denver, Colo.

By ROSCOE POUND

Dean of Law School, Harvard University

In England regulation of procedure in the superior courts of law and equity has gone through four stages. In the first stage procedure is governed wholly by the custom of the tribunal. In a second stage, when the customary procedure has become fixed and settled, changes and improvements come to be made and details come to be provided for by rules of court. In a third stage legislation takes the matter in hand. Parliament makes sweeping changes both in fundamentals and in detail. For a season legislation is called on to bear the brunt of procedural reform. Finally, in a fourth stage, since 1873, the English have returned to regulation of procedure by rules of court, which has proved effective and satisfactory for more than half a century.

How did it happen that in England legislative prescribing of the details of procedure for a time superseded exercise of the rule-making power of the courts and that in the United States,

without ever having tried the rule-making power, as a means of adapting the over-refined eighteenth-century English procedure to our needs, we committed ourselves thoroughly for a season to habitual legislative interference with what ought to be left to the courts? I suppose there are four reasons, each of which is worth looking into in some detail.

In the first place, the movement for reform of procedure, both in England and in America, brought on by way of reaction from the cumbrous, dilatory, expensive, ultra-formal procedure of the eighteenth century, came as part of the legislative reform movement that was one of the outstanding features of Anglo-American legal history in the nineteenth century. It is true there had been legislation on procedure extending back to the law making activity of Edward I. But the regular resort to legislation as a means of governing procedure in the courts begins in England after 1688 and is at its height during the legislative reform movement in the nineteenth century.

Medieval legislation proceeded on ideas fundamentally distinct from those which are presupposed by legislation today. It was taken to be declaratory of custom. Thus the customary procedure that had grown up in the courts, the details fixed by rule of court, and the procedure prescribed by statute, were supposed to rest on the same basis. In each case there was an ascertainment of custom; by practice, by judicial promulgation or by legislative declaration, as the case might be. But from the time of the Tudors new ideas came in. The medieval theory of search for the law gave way to Roman ideas of making law. Ideas of sovereignty drawn from the Corpus Juris and developed by the rise of nationalism and the growth of strong central governments, led in England to conflicts between the Crown and Parliament. Sir Edward Coke, the oracle of the common law, took the side of Parliament and argued for what was to become parliamentary sovereignty. In England, after the revolution of 1688, Parliament was decisively dominant. In the United States, one must admit, by deviation from seventeenth-century England, we took a different course. By constitutional provisions for the separation of powers and by bills of rights, we put checks on the legislative as well as upon the executive. It is quite impossible to understand American public law unless one bears in mind that we derive, not from the English parliamentary polity of today, but from the polity of Tudor and Stuart England. Nevertheless, ideas of legislative supremacy and uncontrolled law making power were in the air and in the books when our institutions were formative. Moreover, there was a palpable legislative hegemony in this country down to the time of the Civil War, the last echoes of which may

be found in the speeches of the senators at the impeachment of Andrew Johnson. Down to the Civil War, the legislative department considered that it represented the people immediately and to a peculiar degree. It conceived that it wielded the general powers of the sovereign people directly and immediately. Hence, it was prone to assume that whatever the sovereign people could do, by virtue of their sovereignty, they could do through legislation. It was not until after the Civil War that judicial enforcement of constitutional limitations on legislation became an every-day matter. Prior to that time, there had been need of judicial enforcement of the constitutional precepts defining the respective limits of federal and state legislation. But a general tendency to question legislative omnicompetence comes with the passing of the de facto leadership of the legislative department, which took place in the last third of the last century.

Thus, both in England and in America, the nineteenth-century overhauling of procedure took place at a time when men turned naturally to the legislature to take the lead in all things. It took place at a time when the legislative department did not doubt its competence to every sort of task. It took place when there had come to be a long tradition of parliamentary sovereignty in England and the de facto hegemony of the legislative in America was unchallenged. Naturally when common-law procedure had to give way to a simpler, more flexible, less formal system, men appealed to the legislature. So far as men could see at that time, such was the appropriate solution of all political and legal difficulties.

A second reason is to be found in the over-conservatism of the legal profession both in England and in America at the close of the first half of the nineteenth century. It is not easy for this generation, to whom the changes wrought by the legislative reform movement of the last century pass for fundamentals of the legal order—it is not easy for us to realize how those changes were regarded by the leaders of the profession at that time. A lawyer who looked back on the whole forty-five years of agitation and legislation that culminated in the Judicature Act, could not refrain from expressing his astonishment at the loathing with which he had been brought up to regard those who took the lead in 1828. There is an impressive lesson for us in what leaders of the New York bar had to say about reform of procedure in 1847 and 1848. Demonstrably many unhappy features of the New York Code of Civil Procedure are traceable to refusal of the strongest men in the profession to take part in a change that had to come; to their persistent resistance where they might and should have guided the reform and given it stability and assured direction. They left to legislation what

the courts should have done and might have done by applying to procedure the same creative resource and inventive power which they displayed so notably in reshaping English substantive law to make a common law for America.

Perhaps it would have been too much to expect the courts to take both substantive law and procedure in hand at the same time. The development of an American common law, adequate to the needs of the pioneer, rural, agricultural society of the last century and equal to the demands of forty-eight states of the most diverse geographical, economic, racial, and social conditions,—the development of such a common law, chiefly on the basis of the English decisions and English statutes of the seventeenth century, in seventy-five years of judicial activity after the Revolution, is one of the marvels of legal history. Moreover, and this must stand for our third reason, our courts had no such models at hand for remaking procedure as they had for the finding and reshaping of commercial law and for the development of the substantive civil side of the law. We should remember that comparative law was no mean factor in the making of an American common law. It is not merely that our courts worked with English materials under the conditions of the new world. The theory of the time took all positive law to be declaratory of a universal, ideal, natural law. Other peoples had reason as well as the English. Indeed, on political grounds, Americans after the Revolution were by no means inclined to attribute ultimate wisdom to the common law of England. One need only look at the older reports in New York, at Kent's Commentaries, or at Story's treatises, in order to see to how large an extent Comparative Law helped give form and supplied content to American law in its formative period.

Comparative law had chief influence in commercial law, where the Continental treatises were truly quarries for American judges and law teachers and law writers. From commercial law its influence spread over the whole civil side of the law. Moreover, both in commercial law and on the civil side of the law generally, a parallel judicial development was going on in England. At the Revolution Lord Mansfield was still upon the bench. The absorption of the law merchant into the common law was still incomplete and the crystallization of equity under Lord Eldon was yet to come. Kent and Story in this country had much to do both with the reception of the law merchant and with putting the doctrines of English equity in their classical form. This resource failed us in procedure. There was nothing for us in Continental procedure. Indeed, the Continental procedure of that time needed overhauling quite as much as English procedure. Moreover, it was not adapted nor was it

adaptable to our judicial organization and judicial and forensic methods. The Anglicizing of procedure that has gone on in Louisiana may serve to show why it was that American lawyers of the formative era of our legal institutions derived nothing from procedure of the civil law. While civilians are quoted on every hand in connection with problems of substantive law, they are never quoted in connection with questions of procedure except by way of pedantic display of learning. Nor could we derive much from parallel development of the law of procedure in England. During the long struggle for reorganization, from 1828 to 1873, England regularly had recourse to legislation. The creative judicial decisions, that were of such use to American judges during the formative era, were rendered in equity, in commercial law, or on new questions of substantive law on its civil side. They were rarely rendered on points of practice because English lawyers were learning to leave such things to the legislature, expecting judges to deal vigorously with new questions of substantive law as they arose, but expecting the means of giving effect to the substantive law to stand fast forever. Thus down to 1873 England set us a bad example. After 1873 we had followed that example not wisely but too well, and had become set in bad ways.

A fourth reason, and not the least reason, for our hitherto settled practice of committing the details of procedure to legislation may be found in the sort of legal education that prevailed in the United States until the present generation. In the beginning all common-law lawyers were apprentice trained. The lawyer learned the art of his craft as any craftsman learns his trade, by watching his elders and seeing how they did things, and doing the like. The first American law schools were simply glorified law offices and their methods and modes of thought have colored the work of our law schools of today. Moreover, this apprentice training has persisted in many parts of the country. Wherever the simple conditions of rural, pioneer, agricultural America of one hundred years ago still obtain, a large part, perhaps the larger part, of those who come to the bar are still trained in this way. This apprentice training is before all else a training in the details of local procedure; something that has characterized our law since the middle of the last century, reaching its high water mark in the last decade of that century. So long as the majority of the profession feel or assume that procedure is the main department of the law, so long as they are prone to think in terms of procedure rather than of substantive law, it will be natural for them to feel that procedure must be left to legislation, if the separation of powers is to be maintained and the substantive law is to be under the control of the legislative department.

Thus we come to the question of constitutionality which every new departure in American law must expect to face. In this connection, it may console us when we observe that eminent lawyers and one strong judge declared the New York Code of Civil Procedure unconstitutional as infringing a constitutional recognition of law and equity as forever and of necessity separate and distinct. But the relation of the rule-making power of common-law courts to the separation of powers, universally recognized or set up in American constitutions, deserves careful consideration.

In truth procedure of courts is something that belongs to the courts rather than to the legislature, whether we look at the subject analytically or historically. It is a misfortune that the courts ever gave it up. Analytically, there is no more warrant for the legislature's imposing a strait-jacket of statutory procedure upon the courts than for its doing the like with the executive. No one supposes that the courts can impose their general ideas of fitness and propriety upon legislative procedure or executive procedure. Nor would the idea that the minutiae of judicial procedure can be laid down by legislators have taken root had it not been for the rule-of-thumb apprentice training of the bulk of the profession, which led them to feel that the whole of the law was bound up in procedure and hence that the legislature must prescribe judicial procedure or abdicate control over the law. Historically the matter is even more clear. For the common-law courts have governed procedure by general rules from the middle ages to the present, and the first public action of the Supreme Court of the United States was to make a rule adopting the practice of the Court of King's bench as the practice of that tribunal.

How do we determine what is executive, what is legislative and what is judicial? In practice, the lines are laid out as a resultant of history and analysis. In doubtful cases, however, we employ a historical criterion. We ask whether, at the time our constitutions were adopted, the power in question was exercised by the Crown, by Parliament, or by the judges. Unless analysis compels us to say in a given case that there is a historical anomaly, we are guided chiefly by the historical criterion.

When American constitutions were adopted, the power to make general rules governing procedure was and had been for centuries in the King's courts at Westminster. Causes were not heard ordinarily at bar in those courts. They were tried at circuit. But the procedure was regulated by general rules of practice promulgated by the judges of the superior courts at Westminster. Turn to Tidd's Practice, which was the standard book on English procedure when our American constitutions

were adopted. You will find there general rules of practice, some of which go back as far as Richard II, many as far as the Tudors, and several as far as the first years of James I, from which we date the reception of the common law in this country.

Hence, if anything was received from England as a part of our institutions, it was that the making of these general rules of practice was a judicial function. Indeed, this was well understood in the beginning of American law. At the very outset, the Supreme Court of the United States, in answer to an inquiry by the Attorney General, said that the practice of the court of King's Bench would obtain for the time being, but that presently the court would promulgate some rules of practice. Not only was this done by the Supreme Court of the United States, but the old Supreme Court of New York, before 1847, promulgated rules of practice, very many of which were simply turned into sections of the Code of Civil Procedure and are in force under that guise today.

But, some will say, granting that such a power might exist in a supreme court, with respect to practice in that court, how far could such a tribunal constitutionally provide rules for subordinate courts which are likewise constitutional? Here again the historical argument is decisive. At the time our constitutions were adopted, the power to prescribe rules of practice for the nisi prius courts was an immemorial power of the superior courts at Westminster. The courts of assize and nisi prius were independent courts. Yet the practice in both was governed by general rules made by the courts at Westminster which had authority to review their proceedings. Indeed, we have good American precedent for this argument. In Ohio the probate court is a constitutional court. In that state a statute provided that the Supreme Court might prescribe rules of practice governing the probate courts. That statute was upheld because historically the power of the court of review to promulgate rules of practice for tribunals of first instance had always been a judicial power.

It is a misfortune that American courts ever gave up their control of procedure. It may be that today, after seventy-five years of codes and practice acts and prolific procedural legislation, we can't go so far as to pronounce such legislative interference with the operations of a coordinate department to be unconstitutional. Perhaps the ground is so far debatable that the courts could not have resisted legislative annexation of that domain. Today, possibly, we must concede that the legislature may enact codes of procedure and detailed practice acts. Equally, however, we should insist that the legislature ought not to do such things, not merely on grounds of expediency and for

the sake of a better and more effective administration of justice, but as a matter of due regard for the constitutional system of separation of powers. None of the coordinate and co-equal departments of our polity can do its work effectively if the minute details of its procedural operations, as distinct from the substantive law it applies or administers, are dictated by some other department. That the legislature should claim such a power is something that comes down to us from the extravagant claims of the legislatures in the period of legislative hegemony. The legislature ought to leave judicial procedure to the judiciary as the judiciary must leave legislative procedure (except as prescribed sometimes by state constitutional provisions) to the legislature. Certainly, if legislatures choose to abdicate their acquired power and to leave judicial procedure to the courts where it belongs, there can be no constitutional objection.

What are the advantages of regulation of procedure by rules of court? Granting that analytically and historically control over judicial procedure is a matter for the judiciary, why should one wish to change the American legislative precedents of seventy-five years and revert to the system of rules of court? What may we expect to achieve by reverting to the common law in this particular, after so long a period of legislative control?

We are not driven to rely upon general reasoning in order to answer this question. We can vouch a generation of experience in England, the experience of the federal equity rules, the experience of the federal admiralty rules, the experience of the rules in bankruptcy and in copyright, and the experience of administrative tribunals throughout the land, to each of which a full control of its procedure through exercise of a rule-making power has regularly been conceded. Indeed, it is a curious anomaly that the legislatures and the bar have been quite willing to allow administrative boards and commissions, tribunals manned by laymen and provided with little or no substantive law, a free hand to shape their own procedure by giving them the rule-making power of the common law judge, while insisting that the courts, manned by trained judges, accustomed to refer their every action to legal principles, and provided with an elaborate apparatus of substantive law, be held down by detailed procedural legislation. One would think that if either were to be given some scope for doing things efficiently in its own way, as dictated by experience, it would be the courts; that if either needed the procedural strait-jacket of a statute, it would be the administrative commission.

I have cited the different kinds of experience with the rule-making power of tribunals which are available for study. What have they to tell us? Compare these examples with the history

of legislative regulation of procedure in New York, where the regime of detailed statutory procedure has prevailed longest and has gone furthest. The hypertrophy of procedure in New York has gone along with an exceptional ineffectiveness as compared with more than one of our older states in which the legislatures have contented themselves with relatively simple practice acts and have left large common-law powers to the courts.

Experience shows abundantly that regulation of procedure by rules of court is the way to insure a simple effective procedure, attained by gradual and conservative overhauling and reshaping of existing practice. It shows that in this way new demands upon the machinery of judicial administration may be met promptly by the ordinary means of legal growth, instead of waiting vainly for years for intervention of the legislative *deus ex machina*. If one doubts this, he need but compare the effective way in which the federal equity rules have dealt with enforcement of decrees calling for construction work, or the simple effective English rule-made procedure as to interpretation of instruments, with the halting American state legislation on either subject.

Again, rules of court have an enormous advantage in that they are interpreted by those who make them. They are not made by one body and then interpreted and applied by another body, which is out of sympathy with them. It took more than half a century for judges to acquire sympathy with the codes of civil procedure. For nearly two generations, courts were governed by historical ideas and common-law conceptions at variance with the spirit of the codes, and in consequence many of their most important provisions long failed of effect. The relatively rapid development of a modern procedure in England is largely due to the circumstance that those who made the rules interpreted and applied them. Moreover, it is easy to bring professional opinion to bear upon the rule-making power, whereas the difficulty of procuring legislative action with reference to even the most crying needs of judicial procedure is notorious. Legislatures today are so busy, the pressure of work is so heavy, the demands of legislation in matters of state finance, of economic and social legislation, and of provision for the needs of a new urban and industrial society are so multifarious, that it is idle to expect legislatures to take a real interest in anything so remote from newspaper interest, so technical, and so recondite as legal procedure. I grant the courts are busy too. But rules of procedure are in the line of their business. When a judicial council or a committee of a bar association comes to a court with a project for rules of procedure, they will not have to call in experts to tell the judges

what the project is about; they will not, as has happened more than once when committees of the American Bar Association have gone before Congressional Committees—they will not have to be taught the existing practice and the mischief as well as the proposed remedy. When rules of procedure are made by judges, they will grow out of experience, not out of the ax-grinding desires of particular law-makers.

Another conspicuous advantage of regulating procedure by rules of court is that changes may be made from time to time as needed; rules may be tried out and molded to the needs of practice. They will not be made once for all by a rigid statutory provision requiring all the pomp and circumstance of repeal or of legislative amendment before they can be abrogated or improved. They will not have to be laid down as a whole *a priori* in advance. They can be built up as the work of the courts dictates and can reflect mature experience, where statutory procedural provisions too often reflect only abstract speculations. The history of American codes of civil procedure and practice acts is full of examples of unfortunate provisions inserted when the statute was first enacted, which have embarassed the administration of justice ever since, and of which neither judicial interpretation nor subsequent legislation has been able to deliver us. In contrast, the few unfortunate features of the first English rules under the Judicature Act were done away with long since.

Most of all however, when procedure is governed by rules of court rather than by statute, the tendency is to make procedure subsidiary to the substantive law as it ought to be. In this connection, one might compare English rule-governed procedure with American statute-governed procedure. But another example is quite as significant. In the old days of Jarndyce and Jarndyce, equity procedure was even more cumbrous, expensive, dilatory and ineffective than common-law procedure in its worst days. Today under the federal equity rules, one seldom meets questions of equity practice in the Federal Reporter. But the states in which common-law procedure has been prescribed in detail by elaborate codes are still struggling with all manner of procedural difficulties as testified to in every volume of their reports.

Are there any disadvantages in regulation of procedure by rules of court to be set over against the foregoing advantages? Study of the English rule-making power in action, of the rule-making power of the Supreme Court of the United States in action, and of rule-making in action in those states where the courts still retain much of their common-law rule-making powers has failed to disclose any. Nor have I found any in the literature of this subject beyond those familiar vague and general

prophecies of disaster with which in all cases our best lawyers have always greeted any project with which they were unfamiliar. The most vigorous attack on revival of the rule-making power is to be found in a recent address of Senator Walsh before the Bar Association of Texas, Louisiana and Arkansas. He feels strongly that the proposal to govern procedure by rules of court rather than by statute is a menace to our institutions and will lead to wide-spread and injurious confusion. But underlying his whole argument is a fallacious assumption that rules of court will substitute one elaborate, detailed, rigid, hard and fast code for another. Apparently he cannot conceive of procedure except as an elaborate, detailed system of more or less arbitrary precepts. Thinking of it thus, he holds rightly that it is better to keep the arbitrary system we have than to replace it by another that we shall have to learn.

But all experience shows that while statutory procedure runs to details, becomes elaborate and over-grown, and is of necessity rigid and unyielding, procedure prescribed by rules of court tends continually to become simple, adapted to its purposes, and adaptable by the simple process of judicial amendment to new situations and needs of practice. If one doubt this, let him compare any set of court rules with even the best of the codes of procedure. If new legislative codes and practice acts, of the sort familiar since 1847, were proposed, the things which Senator Walsh fears might well give us pause. But when he opposes regulation of procedure by rules of court, he invites these very things. For as things are now, legislative codes of procedure are the only resource of our law-makers in a time when more effective judicial administration is urgently demanded. I deprecate new codes as much as he does. Hence I look with confidence to the tried alternative of return to the common-law powers of our courts.

Apprentice-trained, rule-of-thumb-trained lawyers have been unable to think of administration of justice without a hypertrophy of procedure. But we cannot go on in the urban, industrial America of today under the heavy weight of procedural detail with which our courts are struggling. If we demand that our courts do things, we must give them power to do things—we must set them free to do things. We must hold them to the substantive law, indeed. But we must not make the substantive law nugatory by loading the courts with procedural requirements. We must cease to prescribe the details of procedure by legislation. None of you would think of urging a code of substantive law. But every reason you would bring forward against such a code is strong tenfold against codes of procedure and detailed practice acts.

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